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P
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ERRATA.—On page 57, in the title of the *Springfield F. and M. Ins. Co. vs. Allen*, the name of the respondent is by mistake given as *Brown*.

On page 48, in *Bradley vs. The Mutual Benefit Life Ins. Co.*, the opinion of Rapallo, J., is the opinion of the court, and that of Grover, J., the dissenting opinion ; and § 13 of the digest is erroneous and § 212 is correct.

This volume is complete in ten numbers. Numbers four and five, pages 241 to 400, were not published.

THE INSURANCE LAW JOURNAL.

VOL. I.

SEPTEMBER, 1871.

No. 1.

PROSPECTUS.

The INSURANCE LAW JOURNAL will be devoted to Insurance Law and the interest of Insurance generally. There is no branch of law or business, which seems so much to need a legal journal, specially devoted to its interests, as that of insurance. The law pertaining to this subject is of recent origin and much in regard to its principles and application remains unsettled, while the growth and changing character of insurance business, the increasing wealth and power of insurance companies, and the number of States over which the operations of these companies extend, are raising new and important questions, and the courts are continually rendering decisions modifying the law in its application to old subjects, or adapting it to new subjects and circumstances. Our legislatures are constantly changing and adding to the statutory laws, as the necessities of the case, or the caprice of the public, demands. With the exception of works upon marine insurance the treatises upon this subject are comparatively meager. There is not a single work in this country devoted to Life insurance, that sub-

ject, and even Fire insurance, being usually crowded into one or two volumes on Marine insurance.

Few lawyers have the opportunity of consulting the reports of more than three or four States, while in our largest libraries we are often compelled to wait two or three years for some of the regular reports. Business men interested in insurance, who, of all others, need to be familiar with the law affecting them, are still less provided for. There is not a single work in any department calculated to meet their wants, and the Insurance journals do not profess to cover the ground, except in general matters of news.

This Journal is intended to meet the wants of both lawyers and business men. It will each month contain two or three leading articles upon legal subjects. It will, also, during the year, give a digest of every insurance case decided in the United States Supreme Court, and in the State Supreme Courts, with a report in full of the most important cases. This digest and report will in every instance be made from transcripts certified by the clerk or reporter of the court in which the decision was rendered. The most important cases decided in the United States Circuit Courts, and in foreign countries, will be noticed; and the acts of the State legislature, affecting the insurance laws, passed since January 1st, 1871, will be published in full. We shall also discuss the means of securing the passage of such laws as the expansion and interests of insurance and the protection of the public may require, and of preventing unwise and adverse legislation.

The JOURNAL will also contain matters of general interest to lawyers, and to those engaged in business of Life, Fire and Marine insurance: articles relating to the character and standing of insurance companies, the reports of the Insurance Departments of the different States, scientific and medical subjects connected with insurance, insurance business, and general insurance and legal news.

We have made arrangements for securing contributions from several of the most eminent lawyers and

insurance men in the country. The value of such a journal, properly conducted, will be apparent. We intend to make this a journal that no lawyer, or person interested in insurance, can afford to be without.

THE DIGEST.

This digest of Insurance cases is intended for the use, as well of those connected with the business of insurance, as of practising lawyers. We shall give every insurance case decided in the United States Supreme Court, and in the State Supreme Courts, since January 1st, 1871, whether reported in the JOURNAL or not, and also such cases in the United States Circuit Courts as may be worthy of notice. All the points of each opinion which relate, even in a remote degree, to insurance, will be noticed. The digest of each case will be completed in a single number, and under the first point given in the case, the State and Court in which the decision was rendered, and the date of the decision will be stated. If the case is reported in full in the JOURNAL, the page at which it may be found will be indicated. We shall also give the volume of the State or United States Reports, in which it is to be reported, when known. The authorities quoted by the Court in direct support of the point decided will be given, and occasionally, authorities alluded to in a general manner, in the course of the opinion. The latter will be separated from the others by a *dash*. We shall endeavor to state the points decided, even at some sacrifice of smoothness and elegance, as nearly as possible in the form adopted in the decision, and whenever we can, we shall give the *exact* language of the Court, which will be indicated by marks of quotation. At the close of the year we shall give a classified index.

DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

AGENCY.

§ 1. LIFE—*Husband and Wife—Estoppel in pais.*—The husband took out a policy upon his life for the benefit of his wife, and payable to her, and gave his notes in payment of the premium. The notes and the policy each contained a condition that upon a failure in the payment of the notes, or any one of them, at maturity, the policy should become immediately void and the insurer should be released from all obligation under it.—*Held* that the policy was “a contract with the husband, and the terms and conditions to which he assented attach to and qualify the policy, and determine the liability of the insurers.”—*Held*, also, that if the policy is regarded as having been procured by the wife, as the result of an agreement made between her and the company, the husband “was the actor in the transaction and represented the plaintiff, and claiming the benefit of his acts and of the policy procured by his agency; she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions;” and *Held*, also, that there is no question of estoppel *in pais* in the case. There can be no estoppel in behalf of one having full knowledge of all the facts, and “as the payment of the premium by a note, with conditions affecting the policy, instead of in cash, was the

act of the plaintiff's agent, and as the principal is chargeable with knowledge of the act of the agent, and notice to the agent is notice to the principal, it follows that the defendants are not estopped from alleging the truth of the transaction against the plaintiff."

Dunlap's Paley on Agency, 261; *Hutchins vs. Hubbard*, 34 N. Y., 24; *Lawrence vs. Selden*, 1 Selden, 401; *Plumb vs. Cattaraugus Ins. Co.*, 18 N. Y., 394; *Story on Agency*, § 140; *Dezell vs. Odell*, 8 Hill, 219.

Reynolds vs. Lounsbury, 6 Hill, 534; *Andrews vs. Lyons*, 11 Allen, 349; *Howard vs. Hudson*, 2 El. and Bl., 10; *Dewey vs. Field*, 4 Met., 381; *Pitt vs. Berkshire Life Ins. Co.*, 100 Mass., 500.

*Baker vs. The Union Mutual Life Ins. Co.**

Rep'd Jour'l No. 2, p. 97.

N. Y. C. A.

AGENTS.

§ 2. *LIFE—Responsibility of Company for acts of—*
Notice to.—Dr. Sprague, the physician of the person on whose life the policy was issued, in answer to the question in the application, taken by Case, the company's agent, "Is he sober and temperate?" said "Cannot say." Rogers, his friend, in answer to the question, "Are his habits of life temperate?" said "I think so;" but told Case that he had been intemperate in past years. Case informed Thornton, another agent of the company, who had sent him to make the inquiries, "that Mr. Miller was not insurable on account of Mr. Rogers' statement that he had not always been temperate, and that Mr. Rogers had not filled the blank in answer to the question "Has he always been temperate?" Thornton, then, in answer to this question to Rogers, which had been left blank by request of Case, wrote the answer, "So far as I know;" and also wrote the same answer to the same question which Dr. Sprague had left unanswered. Case also, in answer to the question in the application, "Do you consider him, from the information you have, a fit person to be insured, and do you recommend him to the directors as such," wrote "Yes." The person, on whose life the policy was issued, had for many years prior to

* Decision Rendered January 24th. To appear in 43 N. Y.

the date of the policy been a man of very intemperate habits, and the evidence tended to show that his death was occasioned by the use of intoxicating liquors.—*Held* that “an insurance company transacting business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts at such time done with respect thereto,” and that “the court did not err in instructing the jury that the defendant was bound by notice communicated to its agents.”

Vose vs. Eagle Life and Health Ins. Co., 6 Cush., 42; *Smith vs. Ins. Co.*, 24 Pa. St., 320; *Mitchell, et al, vs. Lycoming Mut. Ins. Co.*, 51 Pa. St., 402; *Lowell vs. Middlesex Mut. Fire Ins. Co.*, 8 Cush., 127; *Forbes vs. Agawam Ins. Co.*, 9 id., 470; *Lee vs. Howard Ins. Co.*, 3 Gray, 583.

Rowley vs. Empire Ins. Co., 36 N. Y., 550; *Masters vs. Madison Co. Mut. Ins. Co.*, 11 Barb., 624; *Sepson vs. Montgomery Co. Mut. Ins. Co.*, 9 Barb., 191; *McEwan vs. Montgomery Co. Mut. Ins. Co.*, 5 Hill, 101; *Anson vs. The Winnesheik Ins. Co.*, 23 Iowa, 84.

*Miller vs. The Mutual Benefit Life Ins. Co.**

Rep'd Jour'l, p. 25.

IOWA S. C.

§ 3. FIRE—*Authority of—Waiver.*—Richmond insured as owner, the loss, if any, payable to the plaintiff and Wylie, mortgagees, who, before the renewal, had purchased at foreclosure sale under the mortgage. “The renewal receipt ran to Richmond, showing the premium to have been received of him per Wylie, thus continuing the policy in the same form.” The policy contained the condition that “if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance * * * then * * * this policy shall be void.” The local agent of the company, “duly authorized to issue and renew policies of insurance, and to receive the premium

* Decision Rendered April 5th. To appear in 29th Iowa.

therefor," received the premium and made and delivered the renewal receipt, and knew at the time that the legal title to the property had passed from Richmond to the plaintiff. *Held* "that it was competent for the agent in this case to waive the condition that any change in title or possession shall render the policy void."

Viole vs. Germania Ins. Co., 26 Iowa, 9; *Franklin vs. The Atlantic Fire Ins. Co.*, 42 Mo., 456; *Columbia Ins. Co. vs. Cooper*, 50 Pa. St. R., 331; *N. E. F. & M. Ins. Co. vs. Schettler*, 38 Ill., 166; *Peoria M. & F. Ins. Co. vs. Hall*, 12 Mich., 202; *Clark vs. Union Mut. Ins. Co.*, 40 N. H., 333; *Masters vs. Madison County Mut. Ins. Co.*, 11 Barb., 624; *Rowley vs. The Empire Ins. Co.*, 36 N. Y., 550; *Protection Ins. Co. vs. Harmer*, 3 Ohio St., 452; *Beal vs. The Park Fire Ins. Co.*, 16 Wis., 241; *Hough vs. City Fire Ins. Co.*, 29 Conn., 10; *Kelly vs. Troy Fire Ins. Co.*, 3 Wis., 268-269; *Howard Fire Ins. Co. vs. Bruner*, 23 Pa. St., 50; *Ames vs. N. Y. Union Ins. Co.*, 14 N. Y., 253; *Plumb vs. Cataraugus Ins. Co.*, 18 N. Y., 392; *May vs. Buckeye Mut. Ins. Co.*, 25 Wis., 291; *Wing vs. Harvey*, 27 Eng. Law and Eq. R., 140; *North Berwick Co. vs. N. E. F. & M. Ins. Co.*, 52 Me., 336; *Keeler vs. Niagara Fire Ins. Co.*, 16 Wis., 523; *Borhen vs. Williamsburg Ins. Co.*, 35 N. Y., 131; *Sheldon vs. The Atlantic F. & M. Ins. Co.*, 26 N. Y., 460; *Gait vs. National Protection Ins. Co.*, 25 Barb., 189; *Post vs. Aetna Ins. Co.*, 43 Barb., 351; *Warner vs. Peoria M. & F. Ins. Co.*, 14 Wis., 318; *Gloucester Manfg Co. vs. Howard Fire Ins. Co.*, 5 Gray, 497,

And "that the condition in question was waived when the agent accepted the premium and issued the renewal receipt, knowing the change of title which had been made, and that as such change did not affect the insurable interest of the parties for whose benefit the policy was issued, and who paid the premium, the recovery in this action must be affirmed."

Peoria M. & F. Ins. Co. vs. Hall, 12 Mich., 214; *Campbell vs. The Merchant's & Farmer's M. and F. Ins. Co.*, 37 N. H., 35; *Martin vs. Madison County Mut. Ins. Co.*, 11 Barb. 624; *Marshall vs. The Columbia Mut. Fire Ins. Co.*, 7 Foster, 157; 37 N. Y., 48.

Miner vs. The Phoenix Ins. Co. *

Rep'd Journal, p. 41.

Wis. S. C.

ASSIGNEE.

§ 4. FIRE—*Rights of*.—"Ferris, the grantee of the premises, and owner of the equity of redemption, can,

* Decision Rendered May 8th. To appear in 26 Wis.

as the representative and equitable assignee of Allen, claim no greater rights under the policies than his grantor and assignee, Allen, could have claimed."

Grosvenor *vs.* Atlantic Fire Ins. Co., 17 N. Y., 391.

Springfield Fire and Marine Ins. Co., *vs.* Allen, *et al.**

Rep'd Jour'l, p. 57.

N. Y. C. A.

ASSIGNMENT.

§ 5. FIRE—*Policy*.—Where the defendants issued a policy of insurance against fire on premises, the policy containing the following conditions: "Policies of insurance subscribed by this company shall not be assignable without the consent of the company expressed thereon. In case of assignment without consent, whether of the whole or of any interest in it, the liability of the company by virtue of such policy shall thenceforth cease," and plaintiff assigned the policy as collateral security for money loaned him, without the assignment being submitted to or approved by the company, and afterwards, before the loss, paid the next annual premium, the plaintiff cannot recover. "This condition is a perfectly legal one."

Smith *vs.* Saratoga County Mutual Fire Insurance Company, 1 Hill, 497; *do. vs. do.* 3 Hill, 508; 1 Phillips on Insurance, 477; Angell on Fire and Life Insurance, 249, 251;

Ferree vs. the Oxford Fire and Life Ins. Annuity and Trust Company. †

PENN. S. C.

§ 6. LIFE—*Married Woman*.—"If the policy was a chose in action or an equitable interest, absolutely belonging to the wife," her consent, during coverture, to the assignment, is not an act obligatory upon her.

2 Story Eq. Juris., § 1413; Wood *vs.* Simmons, 20 Mo., 363; Craff *vs.* Bolton, 31 Mo., 355.

The Charter Oak Life Ins. Co. vs. Brant. †

Rep'd Jour'l, p. 33.

Mo. S. C.

* Decision Rendered January 24th. To appear in 43 N. Y.

† Decision Rendered February 20th. To appear in 65 Pa.

‡ Decision Rendered March 27th. To appear in 47 Mo.

CONSTRUCTION.

§ 7. *LIFE—Custom—Estoppel.*—The plaintiff became the agent of the company “by his acceptance of a circular, which contained this language: ‘The usual compensation of agents, so far as we know, is ten per cent. commission on the premiums, with one dollar for each policy, and five per cent. on the premiums on the renewal of policies.’ In about a year afterwards he received another circular, which, like the former, had much of instruction as to his agency, and which contained, in lieu of the language above cited, the following: ‘For your services, as above, you will be allowed a commission of ten per cent. on the first premiums (cash and note,) and five per cent. on all subsequent renewal premiums, so long as you continue the agent of this company,’” and acted on this latter paper fifteen years, until he was discharged, and after that claimed “the five per cent. commission on the renewal premiums of policies, originally made by him as agent, which had been received by the company since he was discharged,” and “to support his claim he undertook to prove, by other insurance agents, that such was the custom as between insurance companies and their agents.”—*Held* that, as a matter of law, there was an express contract, and custom could not be admitted; that the latter circular was substituted as a new contract instead of the first one, “and that its fair construction was to limit the agency to the pleasure of the company, and to terminate the right of the agent to commissions on renewal premiums with the revocation of his agency,” and that after having received and acted upon it for fifteen years he is estopped to deny that it was the contract under which he acted.

*Stagg vs. The Connecticut Mut. Life Ins. Co.**

UNITED STATES S. C.

§ 8. *LIFE—Policy—Death from Intemperance.*—The policy contained the following clauses: “Provided

* Decision Rendered February 13th.

always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured, upon these representations, that in case the said James A. Miller shall * * * die by reason of intemperance from the use of intoxicating liquors * * * this policy shall be void, null and of no effect.”—*Held* that the jury were properly instructed that “the policy must be construed strictly against the defendant, and if you find that Miller’s death was only contributed to by the intemperate use of liquors, then you must find for the plaintiff on this branch of the case,” and that when several causes contribute to death, as a result, the death is to be attributed to the proximate and not the mediate cause.

Oather vs. Springfield Fire Ins. Co., 1 Sumner, C. C., 434; *Wilson vs. Conway Fire Ins. Co.*, 4 R. I., 142.

Miller vs. The Mutual Benefit Life Ins. Co.

—22

§ 9. *LIFE—Policy and Premium Notes.*—*Held* that “the policy and the notes given at the same time for the cash premium, were part of the same transaction, and together made the contract of the parties. They should be read together, if necessary, to ascertain the minds and agreement of the parties.”

Baker vs. The Union Mutual Life Ins. Co.

—21.

§ 10. *LIFE—Statute—Married Women—Policy.*—Where a husband procured a policy upon his life, payable to the sole and separate use of his wife after his death, the annual premiums upon which were paid by himself, and were more than three hundred dollars, which policy the husband assigned as collateral security for borrowed money, his wife joining with him in the assignment,—*Held* that under the following sections of the statutes:

§ 15. “It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use, the life of her husband for any definite period or for the term of his

natural life; and in case of her surviving her husband, the sum or net amount of insurance becoming due and payable by the terms of the insurance, shall be payable to her and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but such exemptions shall not apply when the amount of premiums annually paid shall exceed three hundred dollars."

§ 18. "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself, or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit, and that of her children, if any, independently of her husband and his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in any such policy, or the proceeds thereof."—[2 *Wagner's St.*, p. 396.]

Section 18 makes the exemption in section 15 apply to all policies, whether the same were effected by the wife herself, or by her husband for her benefit; that the law did not intend the husband should withdraw any greater amount than an annual premium of \$300 from his means or from his creditors, and that as the premium was greater in this case, the policy is withdrawn from the operation of the statutes and the assignment should be held valid.

Kerman vs. Howard, 23 *Wis.*, 108; *Eadie vs. Slimmon*, 26 *New York*, 9.

The Charter Oak Life Ins. Co. vs. Brant.

—§ 6.

§ 11. *LIFE—Statute—Married Woman—Policy—Assignment.*—Plaintiff insured his life for the benefit of his wife. Subsequently, with the consent of the company, the husband and wife joined in an assignment of the policy to the defendant to secure the indebtedness of the husband. At the date of the assignment the policy was non-forfeitable. Prior to the institution of the suit, the plaintiff was appointed by the Circuit Court trustee for his wife, and brought the suit in behalf of herself and her children.—*Held* that in the following section of the statute:

§ 18. "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself, or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit, and that of her children, if any, independently of her husband and his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in any such policy, or the proceeds thereof."—[2 Wagner's St., p. 396.]

"The language that the policy shall inure to the separate use and benefit of the wife and her children, applies simply to the manner of the decent and distribution. After the wife has received and reduced the money to possession, and she dies, it shall go to her children, and not to the husband's representatives," and that the law gives the insurance to the wife and allows her to keep and retain it, if she chooses to do so, without molestation, but that there are no terms of restraint used, nor any provisions against voluntary alienation on her part, or against an assignment of it by the husband and wife conjointly.

*Baker, Tr., vs. Young.**

Mo. S. C.

§ 12. FIRE—In the clause of a policy "That all claims under this policy are barred, unless prosecuted within one year from date of loss," the parties to the policy used the word "*prosecuted*" as equivalent to *suit or action*.

Merchants Mut. Ins. Co. vs. Lacroix. †

TEXAS S. C.

§ 13. LIFE—"In the known violation of any law"—*Avoidance of Policy—Death in known violation of law.*—The policy upon the life of the assured contained a proviso that the policy should be null and void in case the

* Decision Rendered April 3. To appear in 47 Mo.

† Decision Rendered April —.

insured should die "by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States, or of the United States," &c. The insured demanded of a boy, seventeen or eighteen years old, between whose father and himself there had been some difficulty, the payment of a bill, which he claimed the father owed him, and upon the boy's refusing payment, he attempted to take possession of a pair of horses the boy was driving, and while so engaged was shot by the boy and killed.—*Held* that in order to bring the case within that part of the proviso concerning "the known violation of any law of these States," it is not necessary that the death should occur, or the cause thereof happen while the assured is engaged in the known violation of the criminal law of the State, but that the proviso includes the known violation of a law for the protection of civil rights of parties, the only sanction of which is a civil action for redress, and that the representatives of the assured cannot recover under the policy.

Cluff vs. Mutual Benefit Life Ins. Co., 13 Allen, 308.

Bradley, Ex'r, vs. The Mutual Benefit Life Ins. Co. *

Rep'd Jour'l, p. 48.

N. Y. C. A.

§ 14. FIRE—"Property"—*Avoidance of Policy—Alienation*—Two policies were issued to the insured upon his property generally: one in his favor, as "owner," and both "upon his four two-story brick stores." At the time of obtaining the policies, the insured had mortgaged the property. There was a condition in each of the policies, "that in case of any change or transfer of title in the property insured, the policy should be void, and cease."—*Held* that "when the word 'property' is used in the clause forbidding alienation, it is used to designate the thing insured, and not the interest of the insured," and that "the change or transfer of title in the property insured, intended in the clause under

* Decision Rendered April 25th. To appear in 45 N. Y.

consideration, was the title and ownership of the thing insured, and, upon such transfer or change, the policy ceased, and became void as to the principal party insured, and but for the saving clause in favor of the mortgagee, would have been voided as to her."

Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391; and see *Jackson vs. Massachusetts Mutual Fire Ins. Co.*, 23 Pick, 418; *Tilton vs. The Kingston Mutual Ins. Co.*, Selden, 405.

Springfield Fire and Marine Ins. Co. vs. Allen, et al.

—14.

§ 15. ACCIDENT—"Public or Private Conveyances."

—By its policy the company "agreed to pay the legal representatives of the intestate, in the event of her death from personal injury ensuing in three months from the happening thereof, when caused by any accident while traveling by public or private conveyances provided for the transportation of travelers, &c." The insured started upon a journey, intending to go to a certain point by rail, thence by steamer to another point, and thence by rail to the place of destination. There were usually hacks at the steamboat landing, seeking passengers for the railroad station, but a large majority generally went on foot. The insured in passing on foot from the landing to the station, to go on board the cars, a distance of about seventy rods, slipped and fell, thereby receiving an injury which caused her death about four days thereafter. *Held* that such walking is the actual and necessary accompaniment of such travel, and, that at the time of receiving the injury, the insured was, within the meaning of the policy, traveling by a public conveyance.

Northrop, Adm'r, vs. The Railway Assurance Co. *
Rep'd Jour'l, p. 46.

N. Y. C. A.

EVIDENCE.

§ 16. LIFE—Where the by-laws of the company authorized the president and secretary, by their joint signatures, to execute notes and bills of exchange, but conferred no authority upon the secretary to act on

* Decision Rendered April 25th. To appear in 43 N. Y.

these subjects alone and apart from the by-laws, and there was no evidence to show that he had authority to bind the company as a party to a draft or bill of exchange,—*Held* that the draft was no evidence against the company, and that the Court below properly excluded it when offered as evidence.

*The First National Bank of Kansas City vs. Hogan.**

Mo. S. C.

§ 17. FIRE—The books were mostly burned, and those not burned were unreliable, and the case, as to the value of the goods, rested chiefly on the testimony of the plaintiffs—the insured—who swore that their sales, during the year preceding the fire, were about \$120,000, and that the goods on hand at the time of the fire were worth, at their cost value, \$65,000.—*Held* that the defendant could introduce the evidence of witnesses in the same city, “engaged in the same business with the plaintiffs, and whose annual sales were equally as large; that grocery merchants in that city for the past six years have not carried, or had on hand at one time, more than one-fifth of their annual aggregate sales, and that this was the case on the day the fire occurred.”—*Held*, also, “that no witness can be asked what the course of trade is in reference to this particular business. This would be either opinion or hearsay. He can only be allowed to tell his personal experience on the subject about which he is called to testify. It is only through the aggregated testimony of all the witnesses that the fact can be proved which so connects itself with the plaintiffs’ business as to require from him an answer.”

The Home Ins. Co. vs. Weide, et al.†

UNITED STATES S. C.

§ 18. FIRE—*Experts—Damages.*—The witness, a farmer, living several miles distant from the store, who

*Decision Rendered April 3d. To appear in 47 Mo.

†Decision Rendered May 2d.

“was in the store quite frequently,” but had nothing to do with the business, and had no better knowledge of the goods or their value than any neighboring farmer might have had, was called upon to give “his opinion of the quantity as well as the value of the goods destroyed.” —*Held* that, “as a rule, witnesses must state facts and not draw conclusions or give opinions;” that “the cases in which opinions of witnesses are allowable constitute exceptions to the general rule;” and that “on questions of value a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks.”

Lincoln vs. Schenectady and Saratoga R. R. Co., 23 Wend., 433; *Brill vs. Flagler*, 23 Wend., 354; *Norman vs. Welles*, 17 Wend., 136; *Lamore vs. Casyl*, 4 Denio, 370; *Clark vs. Baird*, 5 Seld., 183.

Held, also, that “it is not permitted to give in evidence the opinion of witnesses, having knowledge of the subject matter, as to the damages resulting from a particular transaction.”

Morehouse vs. Matthews, 2 Comstock, 514; *Lincoln vs. Schenectady and Saratoga R. R. Co.*, 23 Wend., 433.

And that the referee erred in admitting the evidence. *Teerpenning, et al, vs. The Corn Exchange Ins. Co.* *

N. Y. C. A.

§ 19. *LIFE—Impeachment.*—A witness, testifying as an expert, to matters of opinion, may be impeached by showing that, upon a former occasion, he has expressed a different opinion.

Patchin vs. Astor Mut. Ins. Co., 13 Kernan, 268; *Sanderson vs. Nassau*, 44 N. H., 492.

Miller vs. The Mutual Benefit Life Ins. Co.

—22.

FRAUD.

§ 20. *LIFE—Answers of Physician and Friend.*—*Held* that as the contract was based upon the statements

* Decision Rendered January 24th. To appear in 43 N. Y.

of the physician and friend of the insured, as well as his own, the statements of all three should be considered in determining the question of fraud. The answers of the physician and friend constituted as much a part of the proceedings as those of the insured, and were equally entitled to the consideration of the jury.

Miller vs. The Mutual Benefit Life Ins. Co.

—12.

§ 21. FIRE—*Practice*.—The agent of the company falsely represented to the insured that the company was solvent and responsible; that by its charter it was forbidden to assess or collect more than ten per cent. per annum on its premium notes; that no assessments would be made the first year, and that certain other parties, who were acquainted with the company, had insured their property in the company. The insured gave their premium notes for the entire premium, the charter of the company requiring that a certain amount should be paid in cash in advance, and one note provided on its face that no assessment thereon should exceed ten per cent. of the amount of its face. Plaintiffs brought suit for more than ten per cent.—*Held* that in answer and cross complaint setting forth the above facts, “There is enough of fraud and mistake stated and shown to make it a good defense to the action, and to require a reply to it as an answer, and an answer to it as a cross complaint.”

*Whitman, Rec'r of The Sinissippi Ins. Co. vs. Meissner, et. al.**

IND. S. C.

INSURABLE INTEREST.

§ 22. LIFE.—“At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent.”

* Decision Rendered Feb. 2d. To appear in 23 Ind.

2—VOL. I., No. 1.

3 Kent Com., 10th ed., 483, but see *McKee vs. Phoenix Ins. Co.*, 28 Mo., 383.

The Charter Oak Life Ins. Co. vs. Brant.

—§ 6.

§ 23. *LIFE—Husband and Wife—Assignment—Policy.*—*Held* that the husband “had an insurable interest in his own life, and could lawfully insure for his own benefit, or in favor of any one having an interest in his life, as wife, child, or creditor, and could secure the insurance to the party intended to be benefitted, either by taking a policy naming such intended beneficiary, or by taking a policy payable to himself or his representatives and transferring it.”

1 Phillips on Insurance, § 79; *Lord vs. Dall*, 12 Mass., 115.

Baker vs. The Union Mutual Life Ins. Co.

—§ 1.

LIMITATION.

§ 24. *FIRE—Clause in Policy.*—Where the policy contained the following clause: “That all claims under this policy are barred unless prosecuted within one year from date of loss,”—*Held* that “such a contract in a policy of insurance is not against public policy, nor is it merged in the general limitation laws of the State,” and “that the failure of the appellee to bring his action within one year from the date of loss is an effectual bar to all actions on his policy.”

Riddlesbarger vs. Hartford Ins. Co., 7 Wallace, 386.

Merchants Mut. Ins. Co. vs. Lacroix.

—§ 12.

OWNERSHIP.

§ 25. *FIRE.—Construction—Avoidance—Policy.*—At the time of effecting the insurance the property had been sold on a judgment and execution, but the twelve months allowed for redemption had not expired. The fact of the sale was not disclosed by the insurer. The policy contained the following clause: “If the property to be insured be held in trust or on commission, or be a lease-

hold interest or equity of redemption, or if the interest of the insured to the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company and so expressed in the written part of this policy, *otherwise the policy shall be void.*" Held that the insured had not, at the date of the insurance, the entire, unconditional and sole ownership of the property; that "the purchaser at the sheriff's sale, although he had not acquired a complete title, either legal or equitable, as held in *Philips vs. Demoss*, 14 Ill., 412, had certainly an interest in the land to the extent of his bid, which in a few months would ripen into a title unless redeemed," and that the non-disclosure of this sale avoided the policy.

Reaper City Ins. Co. vs. Brennan. *

ILL. S. C.

PLEADING.

§ 26. LIFE.—"The form of allegation was that the company, 'by its drafts in writing signed by its secretary,' made the obligation sued on. The answer seeks to put in issue the facts here alleged by denying that the company, 'by its draft in writing signed by its secretary, executed the obligation as alleged.' The denial is inartistic, but sufficient under our system of pleading."

Westlake vs. Moore, 19 Mo., 556; *Joy vs. Cooley*, ib., 645; *Wynn vs. Corey*, 43 Mo., 306.

The First National Bank of Kansas City vs. Hogan.

—§ 16.

§ 27. FIRE—*Citizenship of a Corporation.*—The averment in the declaration that the defendant is a corporation created by an act of the legislature of the State of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the State, "is, in legal effect, an averment that the defendant was a citizen

* Decision Rendered May — To appear in 52 Ill.

of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created.

The Germania Fire Ins. Co. vs. Francis. *

UNITED STATES S. C.

POLICY.

§ 28. FIRE—*Clause in.*—A policy was issued to the plaintiff in which reference was made to a survey—No. 280, on file in the office of the Park Insurance Company—as the survey and description of the property insured, and the conditions attached to the policy made this a part thereof and a warranty of the truth of the statements therein made.—*Held* that the survey referred to cannot be rejected, and the residue of the policy upheld, “upon the ground that the plaintiff, when he received the policy, supposed that it was another and different paper, which had been filed in the Park office, to which reference was made in the contract.”

LeRoy, et al., vs. The Market Fire Ins. Co. †

N. Y. C. A.

PRACTICE.

§ 29. FIRE—*Jurisdiction.*—Where it appears on the face of a declaration in a case, on a writ of error from the district court for the northern district of Mississippi, that the plaintiff is a citizen of Illinois, but it does not appear that the defendant is a citizen of Mississippi, it is not necessary for this court to notice the subsequent pleadings, but it will declare that the district court acquired no jurisdiction over the case, and will reverse the judgment and direct the district court to remand the case to the State in which it was instituted.

The Germania Fire Ins. Co. vs. Francis.

—§ 27.

* Decision Rendered March 6th.

† Decision Rendered February 17th. To appear in 45 N. Y.

§ 30. FIRE—*Jurisdiction*.—The State law required the county treasurer to issue county certificates of indebtedness to incorporate companies for the amount of taxes assessed on their investments in the public indebtedness of the United States, with interest thereon, “and which taxes have been judicially decided to have been illegally imposed and collected,” and the United States Supreme Court had adjudged such tax illegal, so far as the government “bonds and stocks” were concerned, but had not, till after refusal of the county treasurer to issue such county certificates, decided the tax illegal in its application to “certificates of indebtedness,”—*Held*, on writ of error to the State Court for refusing mandamus, that the writ be dismissed and that it ought to appear from the record that a federal question was raised, in order to give this court jurisdiction of the case, and that, from all that appears, the decision of the court of appeals may have been passed simply on its construction of the State statutes, and that they only decided that the plaintiff had no *remedy* under that statute.

The Phœnix Ins. Co. vs. Gardiner, Treas.

UNITED STATES, S. C. *

§ 31. LIFE—*Misrepresentation—Materiality of—Jury*.—It was alleged that the answers of the party insured to the questions in the application, “Is the party sober and temperate?” and “Has he always been so?” were false. The court gave this instruction to the jury: “It is for you to determine the materiality of the alleged misstatements, if any have been proven.”—*Held* that “a misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since by making such inquiry he implies that he considers it so,” and that the instruction was erroneous.

1 Phillips, on Insurance, § 542, and cases cited; Campbell vs.

* Decision Rendered March 27.

The New England Mutual Life Ins. Co., 98 Mass., 401; Davenport vs. New England Ins. Co., 6 Cush., 341.

Miller vs. The Mutual Benefit Life Ins. Co.

—§ 2.

§ 32. *LIFE—Evidence—Weight of—Jury.*—There was some testimony tending to impeach a witness.—*Held* that “However slight the effect of this testimony, and however little the consideration to which it was entitled from the jury, still its weight is to be determined by them. It is not the province of the court, by an instruction, to withdraw any proper testimony from the jury.”

Miller vs. The Mutual Benefit Life Ins. Co.

—§ 2.

§ 33. *LIFE—Pleading.*—The judge in the court below gave as a reason for overruling a motion for a new trial, that he believed the recital in the policy that the first year's premium was paid, was conclusive upon the company and could not be contradicted, the policy not being in the record and the pleadings having failed to set out any receipt in full of the first year's premium.—*Held* that “the court had no right to go out of the record to inspect the policy to see whether it did not contain some other provision upon which a recovery might have been had, without reference to the condition (stated in the pleadings). That matter was *coram non judice*, and the same reason that made it improper for the circuit court to consider the question should prevent us from doing so.”

Froelich vs. The Atlas Mut. Life Ins. Co.

Mo. S. C.*

PREMIUM.

§ 34. *LIFE—Acknowledgment of Receipt.*—“As between the immediate parties to the contract the acknowledgment of the receipt of the first annual premium, embodied in and indorsed on the policy, is but an ad-

* Decision Rendered February 3d. To appear in 47 Mo.

mission, and liable to be contradicted. It is simply evidence of the fact of payment, but not conclusive."

Sheldon vs. Atlantic Fire and Marine Ins. Co., 28 N. Y., 460; *Insurance Co. of Pennsylvania vs. Smith*, 8 Wharton, 520.

"There is nothing in principle to take contracts of insurance out of the rule, which governs and controls all other contracts, even the most solemn."

Baker vs. The Union Mutual Life Ins. Co.

—1 1.

SUBROGATION.

§ 35. *FIRE—Avoidance of Policy.*—The policies contained a provision that in case of any change or transfer of title in the property insured, the policy should be void and cease, and also that "whenever the insurers shall pay to the mortgagee any sum for loss, for which loss the company would not have been liable to the mortgagor, or owner, the insurers shall be subrogated to the rights of the mortgagee, and entitled to an assignment of the mortgage." The mortgagor, before the loss, sold the mortgaged premises.—*Held* that "The mortgagor could not have recovered upon the policies, and it follows that he is not entitled to have the moneys paid under the policies to the mortgagee applied to the satisfaction of the mortgage," and that "the insurers are entitled to be subrogated to the rights of the mortgagee."

Springfield Fire and Marine Ins. Co. vs. Allen, et al.

—1 4.

WARRANTY.

§ 36. *LIFE—Representation.*—The application by the assured for a policy on the life of her husband, Miller, comprised five papers, headed respectively: "Particulars required from the persons proposing to affect assurance on lives in this company;" "Questions to be answered by the physician of the party applying for insurance;" "Questions to be answered by the friend of the party applying for assurance;" "Questions to be answered by the agent, if the applicant is not personally known to him;" "De-

claration to be made and signed by a person proposing to make an assurance on the life of another." The policy contained the following clauses: "or if the statements made by, or on behalf of, or with the knowledge of the said assured to the company, as the basis of, or in the negotiation for this contract, shall be found in any respect untrue, then, and in each of said cases, this policy shall be null and void," "and it is also understood and agreed by the within assured, to be the true intent and meaning hereof, that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."—*Held* "that the statements contained in the *declaration* can alone be regarded as warranties, and that the answers of Miller to the *questions* propounded to him are mere representations."

1 Phillips, on Insurance, §§ 669 and 754; *Campbell vs. New England Mutual Life Ins. Co.*, 98 Mass., 389-90; *Daniels vs. Hudson River Fire Ins. Co.*, 12 Cushing, 416; *Snyder vs. Farmers Ins. and Loan Co.*, 13 Wend., 92; *Miles vs. Connecticut Ins. Co.*, 3 Gray, 580.

Miller vs. The Mutual Benefit Life Ins. Co.

—§ 2

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

SUPREME COURT OF IOWA,

Appeal from Delaware Circuit Court.

MARY L. MILLER,

vs.

THE MUTUAL BENEFIT LIFE INS. CO.* }

On the 19th day of February, A. D. 1866, Mary L. Miller, through her husband James A. Miller, made an application to the Mutual Benefit Life Insurance Company for a Policy of insurance upon the life of her said husband, as follows, to wit: "I, Mary L. Miller, wife of James A. Miller, of Le Claire, in the county of Scott, in the State of Iowa, being desirous of effecting an assurance with the Mutual Benefit Life Insurance Company, in the sum of five thousand dollars, upon the life of James A. Miller, of Dubuque, in the State of Iowa, the person described on the other side, during the whole continuance thereof, do hereby declare that the age of the said James A. Miller, next birth day, will be thirty one years, that he does not, to the best of my knowledge and belief, practice any bad or vicious habit that tends to the shortening of life.

* * * * *

And I hereby agree that the answers of the said James A. Miller, and those of his physician and friend, shall be the basis of the contract between myself and the company; and if any untrue or fraudulent allegation is contained in those answers, or in this declaration, all moneys which shall have been paid to the said company on account of the assurance made in consequence thereof, shall be forfeited for the benefit of the company."

* Decision Rendered April 5, 1871.

Dated this 19th day of February, in the year of our Lord one thousand eight hundred and sixty-six. MARY L. MILLER.

By JAMES A. MILLER."

Twenty-two printed interrogatives were propounded to James A. Miller, among which, with the answers thereto, were the following, to wit: Name and residence of the party's usual medical attendant, or of the medical attendant of his family, to be referred to for information as to his health.

DR. SPRAGUE, DUBUQUE, IOWA.

Name and residence of an intimate friend, to be referred to for similar information.

CHARLES J. ROGERS, ESQ., DUBUQUE, IOWA.

Is the party sober and temperate? Yes.

Has he always been so? Yes.

Is the party aware that any untrue or fraudulent allegation made in effecting the proposed assurance will render the policy void, and that all payments of premiums made thereon will be forfeited? Yes.

Among the questions propounded to Charles J. Rogers, with the answers thereto, were the following, to wit:

Are his habits of life temperate? I think they are.

Has he always been temperate? So far as I know.

Among the questions proposed to Dr. Sprague, with the answers thereto, are the following:

Is he sober and temperate? Cannot say.

Has he always been so? So far as I know.

Thornton, who was an agent of the company, sent Case, who was also the company's agent, to procure the answers of Rogers and Dr. Sprague to the interrogatories propounded to them. The testimony of Rogers as to the interview between himself and Case, is as follows: "I looked over the questions I was requested to answer in the application, and when I saw the questions: 'Is he sober and temperate? and has he always been so?' I said to Mr. Case: Mr. Miller was already insured in the Equitable, and I had advised him not to surrender his policy in that company, as it had been running for a number of years, and if this company was going to take a policy on his life, I wanted them to take him understandingly. So far as I was concerned, to the first question: 'Is he sober and temperate?' I could answer yes; I gave my reasons why I could so answer. I had got Mr. Miller a situation in my brother-in-law's bank, upon the express promise that he would not drink any more; that he had been perfectly sober since he had been in the bank, and I trusted he would be so in the future. That in regard to the next question: 'Has he always been temperate?' I said, I had known Mr. Miller for a period of ten years, and during that time he had not always been a man of sober and temperate habits, but had indulged in the use of intoxicating liquors; that if I answered that question at all, I should have to answer it

conscientiously, and say, No, to which he replied that it was a mere matter of form, and requested me to leave it blank. Therefore, I filled out the answers in the blanks to the other questions and signed my name thereupon. Mr. Case took the application out of my office, and I never saw it afterwards until it was introduced in evidence on the former trial of this cause. I never gave anybody permission to fill the blank."

Case returned with the interrogatories to Thornton, and informed him, "that Mr. Miller was not insurable an account of Mr. Rogers' statement that he had not always been temperate, and that Mr. Rogers had not filled the blank in answer to the question, "Has he always been temperate?" The answer, "So far as I know," to the interrogatory, "Has he always been so?" propounded to Rogers, is in the hand-writing of Thornton. Thornton testifies that Rogers gave him permission to so fill it. Dr. Sprague also failed to answer the question, "Has he always been so?" and the evidence tends to prove that the answer thereto is in the hand-writing of the agent Thornton. There is *no evidence* that he had any authority from Sprague to so answer it. Among the questions answered by S. M. Case, the agent, was the following: "Do you consider him, from the information you have, a fit person to be insured, and do you recommend him to the directors as such?" Ans. "Yes." In pursuance of these proceedings, a policy of insurance upon the life of James A. Miller was issued, containing among others, the following provisions, to wit: "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured, upon these representations, that in case the said James A. Miller shall *

* * * * die by reasons of intemperance from the use of intoxicating liquors, * * * * this policy shall be void, null and of no effect, and it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

James A. Miller died on the 19th day of April, 1868. This suit was commenced in the Delaware Circuit Court, for the recovery of the amount of the policy. The answer admits the issuance of the policy; the death of James A. Miller; that he was the husband of plaintiff, and that plaintiff owns the policy, and avers that James A. Miller made false and fraudulent answers to the questions—"Is the party sober and temperate?" "Has he always been so?" And that James A. Miller died by reasons of intemperance from the use of intoxicating liquors, whereby it is alleged that said policy became void.

The testimony establishes that Miller, for many years prior to the insurance, had been a man of very intemperate habits, and tended to prove that his death was occasioned by the intemperate

use of intoxicating liquors. The cause was tried by a jury. Verdict and judgment for plaintiff for \$5000. Defendant appeals. The further necessary facts appear in the opinion.

ADAMS & ROBINSON, *for Appellant.*

D. C. CRAM & C. J. ROGERS, *for Appellee.*

DAY, CH. J.

I. The defendant requested the Court to give the jury the following instructions: "It is provided in the policy, that it is the true intent and meaning thereof that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, shall be found in any respect untrue, then the policy should be void. If, therefore, you find said declaration in any respect materially untrue, your verdict must be for the defendant."

The Court refused this instruction and gave the following:

"An untrue or fraudulent statement, or denial made by the applicant, of a fact material to the risk, to induce the issuance of a policy, will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived, or stopped himself from relying upon such misstatement to avoid the policy."

"If an insurance company issues a policy upon a greater risk than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact."

"If you find that James A. Miller made an untrue or fraudulent statement of fact material to the risk, in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and after knowing such fact fully, received the application, the premium money, and notes, and issued the policy, in which case you should find for the plaintiff."

"A full knowledge of the truth of the alleged misstatements of Miller in the application, communicated to Thornton and Case, or either, was a communication to the company."

The refusing to give the one, and the giving of the other instructions, the defendant assigns as error. This assignment presents for our consideration this interesting question: Is an insurance company, transacting business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, affected by the knowledge acquired by such agent, when engaged in procuring an application, and bound by his acts at such time done with respect thereto? Upon this point there is much conflict in the decisions. In the case of *Vose vs. Eagle Life and Health Insurance Company*, 6 Cushing, Mass., 42, it was held that where an agent of a Life Insurance Company, who was not authorized to agree for insurance, knew of the falsity of a material representative by an applicant, such knowledge would not prevent the company from insisting upon a discharge in conse-

quence of the false representation. The same doctrine was recognized in the case of *Smith vs. Insurance Company*, 24 Pa. State, 320. In *Mitchell et al vs. Lycoming Mutual Insurance Company*, 51 Pa. St. 402, it was held that an agent of Ins. Co. whose duty is to take surveys, receive applications for insurance, examine the circumstances of a loss, approve assignments, and receive assessments, is not authorized to accept notice of over insurance or waive its consequences, and the case of *Wilson vs. Conway Fire Ins. Co.* does not stop with a recognition of the foregoing doctrines, but holds that an agent of an Insurance Co. empowered merely to receive written applications for insurance, to transmit them to the company, and, if they decide to take the risk, to receive the policy executed by them, and to issue it to the applicant upon receipt from him of the premium, *is not the agent* of the company for the making of applications; and if employed by the applicant, or permitted to act for him in drawing up the application, *is his agent*, for whose mistakes of fact committed in the statements or answers to interrogatories in the application *he* is responsible. To the same purport are *Lowell vs. Middlesex Mutual Fire Ins. Co.*, 8 Cush., 127; *Forbes vs. Agawam Ins. Co.* 9 id., 470; *Lee vs. Howard Ins. Co.*, 3 Gray, 583.

In support of the converse doctrine, see *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550. In this case the plaintiff stated to the agent verbally the facts necessary to meet the requirements of the rules of the company, and among other things informed him that the premises were incumbered by mortgage. An application was signed in blank by plaintiff and given to the agent, he promising to insert over the signature thus obtained the particulars thus furnished him, as a basis of the insurance, on his return to his residence. In filling up the application the agent inserted what was *not* the fact, and in violation of his instructions, that there was *no* incumbrance on the premises. It was held that he was the agent of the company in filling up the application, and that the company was bound by acts. In the case of *Masters vs. Madison Co. Mutual*, 11 Barbour, 624, it was held that although the by-laws of an insurance company make the person taking a survey in its behalf the agent of the applicant, still he is the agent of the company also, and it is bound by his acts. In the case of *Sepson vs. Montgomery County Mutual*, 9 Barbour, 191, it was held that where a policy of insurance requires that in case of any prior existing insurance upon the same property, notice thereof shall be given to the company; notice to an agent authorized to make surveys and receive applications for insurance, and to receive the moneys paid by the assured is sufficient, and that such notice need not be in writing. In the case of *McEwan vs. the Montgomery County Mutual Ins. Co.*, 5 Hill, 101, it was held that notice to the traveling agent of the company, whose business was to solicit insurance, make surveys, and receive applications whilst actually engaged in preparing an application for a policy, was binding upon the com-

pany, although the notice never reached the company; and that notice to an agent relating to business which he is authorized to transact, and while actually engaged in transacting it, will *in general* enure as notice to the principal. See also *Rowley vs. Empire Ins. Co.*, 3 Keys, 559, and *Anson vs. The Winnesheik Ins. Co.*, 23 Iowa, 84. To this latter view the judicial mind seems rapidly tending, and it is certainly more in accord with the enlightened and progressive spirit of the age. These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth provided with blanks and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks, it is more in consonance with reason that the loss should be borne by the company, than that the assured should be made the victim of the incompetency or the avarice of the agent. More especially is this true, in view of the fact that the company has the means of indemnity through the bond of the agent.

Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents, and the masses will, in part at least, be relieved from an annoying importunity, which often leads them to procure policies without the full concurrence of their judgments, and in opposition to their best interests. The business of insurance is rapidly increasing in magnitude and importance, and it is as essential to the companies themselves as to the assured, that the rules of law declared applicable to them should be based upon just and equitable principles, and administered in a manner in harmony with the doctrines of an enlightened jurisprudence. It is quite time that the technical constructions which have pertained, with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals. It follows that, in our opinion, the Court did not err in instructing the jury that the defendant was bound by notice communicated to its agents.

II. The Court gave the following instructions, to wit:

"The language of the policy does not make the statements, contained in the application for it, matters of warranty, but matters of representation."

The defendant excepted to this instruction, and assigns the giving of it as error. A warranty differs from a representation in two essential respects:

1. A warranty constitutes a part of the contract, and it is necessary that it should be exactly and literally complied with; but a representation is collateral to the contract, and it is sufficient that it be equitably and substantially complied with.

2. In case of a warranty, the burden of proof is upon the party seeking indemnity to establish a case in all respects in conformity with the terms under which the risk was assumed; but in case of a representation, the burden is cast upon the defendant to set forth and prove the collateral facts upon which he relies.

1 Phillips, on Insurance, Secs. 669 and 754, and *Campbell vs. New England Mutual Life Insurance Co.*, 98 Mass., 389-90. In the case of *Daniels vs. Hudson River Fire Insurance Co.*, 12 Cushing, 416, Shaw, C. J., very clearly and forcibly illustrated the distinction between a warranty and a representation. He said: "The difference (between a warranty and a representation) is most essential. If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation and is untrue, it does not avoid the contract if not willful or if not material. To illustrate this: the application in answer to interrogatory, is this: 'Ashes are taken up and removed in iron hods,' whereas it should turn out in evidence that ashes were taken up and removed in copper hods—perhaps a set recently purchased and unknown to the owner. If this was a warranty, the policy is gone; but, if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms."

In the case of *Campbell vs. New England Mutual Life Ins. Co.*, it was said that: "When statements or engagements on the part of the insured are inserted, or referred in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of expression and the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument. If they are contained in a separate paper referred to in such a manner as to make it a part of the contract, the same consideration of course will apply * * * * * In considering the question whether a statement forming a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intentment of the words used by the parties." Citing *Daniels vs. Hudson River Ins. Co.*, 12 Cushing, 416, 424; *Blood vs. Howard Ins. Co.*, 12 Cushing, 472; *Jefferson Ins. Co., vs. Cotheal*, 7 Wend., 72; *Forbush vs. Western Mass. Ins. Co.*, 4 Gray, 337, 340. The application is in itself collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of *representations*. They are to be so construed, unless converted into warranties by force of a reference to them, in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall

form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it part of the policy, it will not be so treated. *Campbell vs. New England Mutual Life Ins. Co.*, 98 Mass., 391-2; *Snyder vs. Farmers Ins. and Loan Co.*, 13 Wend., 92. In the case of *Daniels vs. Hudson River Fire Ins. Co.*, Shaw, C. J., having alluded to the fact that a warranty, however immaterial, if untrue, avoids the policy, uses this language: "Hence it is, we suppose, that the leaning of all Courts is to hold such a stipulation to be a representation, rather than a warranty, in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real interest and purpose which the parties have in view in making their contract."

And the learned Chief Justice in the same case further said: "If by any words of reference the stipulations in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy."

In the case of *Campbell vs. New England Mutual Life Ins. Co.*, the defendant insisted, as in the present case, that certain statements were to be regarded as warranties, and the point decided in the case is so pertinent to the present inquiry, and the reasoning is so clear and forcible, that we feel justified in quoting further from it. The Court said: "In every case cited in support of the defendant's position, there was an express reference in the policy which made the application a part of the contract. The one most relied on, and claimed to be especially applicable to the facts of the present case, is that of *Miles vs. Connecticut Ins. Co.*, 3 Gray, 580.

In that case it was declared in the policy itself to be expressly understood and agreed to be the true intent and meaning hereof, that if the proposal, answer and declaration made by the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void. In that proposal the assured declare (among other things) that the answers and statements therein made are correct and true, and agree that the answers given to the following questions, and the accompanying statements, and this declaration, shall be the basis, and form part of the contract or policy between them and the said company.

Two marked features in that case distinguish it from the present: *First*, the clause in the policy relates distinctly and exclusively to the paper called "The Proposal and Declaration." *Second*, when the two papers are thus brought together, there is a distinct agreement, not only that the statements are true and correct, but that they are to form a part of the contract. In the present case, the policy contains no reference to any application, nor to any declaration or statement in writing made or to be made by the assured. The only clause in the policy which can have any bearing upon the question, when disconnected from other provisions of a diverse character, reads as follows, namely:

"Or if the statements made by or on behalf of, or with the knowledge of the said assured, to the company, as the basis of, or in the negotiation for this contract, shall be found in any respect untrue, then, and in each of said cases, this policy shall be null and void."

It is clear that this is not a reference to any particular instrument or paper, but it includes any and all statements, whether oral or written. The defendant, however, contends that a written application having been made in this case, which, by its own terms, declares the statements therein contained, to be made as the basis of the insurance applied for, the policy will attach to that application as containing the statements referred to, and thus constitute an express warranty. We are far from being ready to concede that the reference is sufficiently definite to warrant the bringing of the two papers together for the purpose of giving a construction to the contract. But even if the application may properly be resorted to for aid in the construction, it contains no agreement, and no words to indicate that its statements are to be taken as warranties; nor that they are to form part of the contract."

In the case at bar, the proceedings with reference to the procuring of the policy comprise five papers. The one designated "A," is headed: "Particulars required from persons proposing to effect assurance on lives in this company." That designated "B," is headed: "Questions to be answered by the physician of the party applying for insurance." That designated "C," is headed: "Questions to be answered by the friend of the party applying for assurance." That designated "D," is headed: "Questions to be answered by the Agent, if the applicant is not personally known to him." And the *fifth* is designated as follows: "Declaration to be made and signed by a person proposing to make an assurance on the life of another."

This last mentioned paper is the one which appears first in the statement of facts, and is signed "Mary L. Miller, by James A. Miller." To this, reference is made in the policy as follows:

"And it is also understood and agreed by the within assured, to be the true intent and meaning hereof, that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void." It is worthy of note that the *declaration* is referred to by name, and that to none of the other papers, each of which has a specific designation in the proceedings, is any reference made in the policy. In this respect it differs from the case of *Miles vs. Connecticut Ins. Co.*, before alluded to, in which the policy made direct reference to the *proposal*, *answer* and *declaration* made by the assured, and provided that if they were found in any respect untrue, the policy should be null and void. Applying the principles of the foregoing decision to the present case, it follows that the statements contained in the *declaration* can alone be regarded as

warranties, and that the answers of Miller to the *questions* propounded to him are mere representations.

If the instruction of the Court had reference to the answers to the printed interrogatories, it was proper. If it had reference to the *declaration* it was not error to the prejudice of the appellant. the only alleged misstatement, of which complaint is made, is contained in the answer of Miller to the questions asked him. Hence it becomes quite immaterial what construction is placed upon the statements in the declaration. As the Court did not err in giving the foregoing instruction, it follows that the fourth instruction asked by defendant, embodying a doctrine at variance with it, was properly refused.

In the case of Henry Wilkenson *vs.* The Conn. Mutual Life Ins. Co., decided at the December term, 1870, it was said: that under the terms of the policy in that case, the answers to the questions contained in the application became warranties. That action was against the same company in which the decision of Miles *vs.* Conn. Ins. Co., 3 Gray, 580, was rendered—the policies of which, as we have seen, contain provisions differing widely from that now under consideration.

III. The Court further instructed the jury as follows: "It is for you to determine the materiality of the alleged misstatements, if any have been proven." This instruction we consider erroneous. The only misstatements complained of, are the answers of Miller to the following questions, to wit: "Is the party sober and temperate?" "Has he always been so?" A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since by making such enquiry he implies that he considers it so. In all jurisprudence this distinction is recognized. It is practically to written answers to written inquiries referred to in a policy. The rule is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if by making specific inquiry he implies that he considers a fact to be so, the other party is bound by it as such. 1. Phillips on Insurance, § 542, and cases cited. Also Campbell *vs.* New England Mutual Life Ins. Co., 98 Mass., 401. Representations of this kind differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance, that is, whether the representation is in every material respect true, is a question of a fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is notwithstanding immaterial. An illustration will make plain the view of the Court. Suppose that in answer to a specific question the assured states his age is thirty years. It appears from the evidence that his age is a week or a month greater. The question would be a proper one for the jury to say whether the representation, though strictly and technically untrue, was not substantially

and materially true. But suppose it appears from the evidence that the age of the assured is fifty instead of thirty years. It is no the province of the jury to say that the representation though untrue is immaterial, as is well said in the case of *Campbell vs. New England Mutual Life Ins. Co.*; it is not within the province of the jury, under the guise of determining whether the statements of the applicant were materially false or untrue in some particulars, material to the risk, to find that diseases and infirmities were not materials to be disclosed, which the parties had by the form of the contract of insurance and of the contemporaneous written application conclusively agreed to consider material. See also *Davenport vs. New England Ins. Co.*, 6 Cushing, 341. We are aware that there are authorities which sustain the instruction of the Court, but they seem not to have noticed the distinction here recognized, and are not, in our judgment, so much in accord with sound legal principles as those which support the converse doctrine.

IV. The defendant assigns as error the refusal of the Court to give the following instruction, to wit: "The proper evidence of the cause of a disease is the testimony of medical men, whose practice has been such as to enable them to speak as experts. Upon this point you have the testimony of Dr. Staples, who attended Miller in his last sickness, and whose practice for fifteen years, qualifies him to speak as an expert as to the cause of Miller's disease. If therefore you believe his opinion to be that the disease of which Miller died was caused by intemperance, from the use of intoxicating liquors, in other words if you believe his opinion to be that Miller died of congestion of the lungs and brain, and that such congestion was caused by irritation of the stomach, and that the irritation was caused by the use of intoxicating liquors, and if you find that this testimony is uncontradicted, then his opinion must prevail." Upon this branch of the case the Court instructed, as follows: "The opinion of a physician is competent evidence as to the cause of death." In this action of the Court there was no error. There was no testimony contradicting Dr. Staples as to the cause of Miller's death, but there was *some* testimony tending to impeach him. However slight the effect of this testimony, and however little the consideration to which it was entitled from the jury, still its weight is to be determined by them. It is not the province of the Court, by an instruction, to withdraw any proper testimony from the jury. Had this instruction been given, its effect might have been to lead the jury to believe that, as there was no other testimony than that of Dr. Staples as to the cause of death, his opinion must prevail, without regard to the testimony introduced for the purpose of impeachment. The instruction given by the Court contained the law as to the competency of opinion of the doctor, and very properly left the weight of this opinion to be determined by the jury.

V. It is claimed that the Court erred in giving the following instruction: "The defendant avers that there were certain untrue

and fraudulent statements contained in the application by James A. Miller—insists that only his statements in regard to his health and habits, should be inquired into. But as the contract was based upon the statements of the insured's physician and friend, as well as his own, the statements of all three should be considered in determining the question of fraud." This instruction is proper. The answers of the physician and friend constituted as much a part of the proceedings as those of Miller, and were equally entitled to the consideration of the jury.

VI. The giving of the following instruction is assigned as error: "If an insurance company issue a policy upon a risk greater than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact, for this would simply be allowing insurers to commit a deliberate fraud upon the insured." The correctness of this instruction as an abstract proposition is conceded. It is said, however, that it assumes that the jury would be justified in finding from the evidence, that the company had full knowledge that the risk was greater than an ordinary one. We have before seen that the company is affected by the knowledge of its agent, acquired when actually engaged in procuring the application for the policy. The defendant, however, insists that there is nothing in the record which shows that either Case or Thornton, had knowledge that Miller's habits had been intemperate. We think that the testimony of Rogers as set forth in the statement of this case *tends* to establish this fact, and that the question of this knowledge was properly submitted to the jury.

VII. It is claimed that the Court erred in instructing the jury as follows: "If you find that Miller's death was produced by other causes, then you should find for the plaintiff on this branch of the case." "The policy must be construed strictly against the defendant, and if you find that Miller's death was only contributed to by the intemperate use of liquors, then you must find for the plaintiff on this branch of the case." "In order to avoid the policy the defendant must satisfy you, by a preponderance of evidence, that the sole or paramount cause of Miller's death was caused by the intemperate use of intoxicating liquors." The defendant claims that "If intemperance shortens life, it is a cause of death within the meaning of the policy," and that the policy is thereby avoided. It rarely, if ever, happens that the intemperate use of intoxicating drinks is indulged in for a considerable period, without, to some extent, shortening life. The consequences of the construction contended for by the defendant would, therefore, be that an insurance company which had assured the life of one known to be intemperate, and which had charged a higher rate of insurance in consequence of such fact, could exonerate itself from liability, upon the policy, by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an

effect is that which immediately preceds and produces it as distinguished from the *remote mediate* or *predisposing* cause. When several causes contribute to death, as a result, it may be externally different to determine which was the remote and which was the immediate cause; yet this difficulty does not change the fact the death is to be attributed to the proximate and not the mediate cause. Nor is the difficulty in questions of this kind any greater than that which arises in questions of negligence, contributory negligence, and many others which are constantly the subject of judicial investigation. That the policy is to be construed strictly against the company, see *Oather vs. Springfield Fire Ins. Co.*, 1 Sumner, C. C., 434; *Wilson vs. Conway Fire Ins. Co.*, 4 R. I., 142.

The instruction given, we think, correctly reflected the law.

VIII. The deposition of the plaintiff was introduced as follows: "Two days before my husband died, and when Dr. Staples was first called, he stated that my husband had a severe attack of congestion of the lungs: on the day following he repeated this same language, and stated that I need not be alarmed if my husband was delirious, as congestion of the brain usually accompanied congestion of the lungs, and continued to remark that my husband had done work enough to kill any ordinary man, or perhaps two men, and that he had no doubt injured himself by leaning against the desk."

The attention of Dr. Staples was directed, upon the cross-examination, to this conversation, and he stated that he thought he did not make the statements above detailed. The deposition was introduced for the purpose of impeachment.

It is claimed that the statements were mere matters of opinion, and that with respect to them the witness cannot be impeached. The witness, as an expert, testified to matters of opinion, and may be impeached by showing that, upon a former occasion, he had expressed a different opinion. *Patchin vs. Astor Mutual Ins. Co.*, 13 Kernan, 268; *Sanderson vs. Nashua*, 44 N. H., 492.

IX. Some objections were made, upon the trial, to the introduction of testimony, which may be briefly considered.

The evidence tending to show that Case and Thornton had knowledge that Miller's previous habits had been intemperate, was proper for the reasons already considered. The evidence showing that the certificate of Rogers and Sprague were incomplete when delivered to the agents, was competent for the same reasons. The receipt for premium signed by Thornton as "General Agent" constituted a link in the chain of testimony tending to show the extent of Thornton's authority, and, although alone it would not establish the extent of his agency, yet as bearing upon that question, it was properly admitted, and even if erroneously admitted, it was, under the views herein expressed, error without prejudice.

X. The errors considered, embrace substantially all those insisted upon in the agreement, as the cause must be reversed for the error already noticed it is not necessary to consider whether the verdict is sustained by sufficient testimony. For the error of the Court, in submitting to the jury the materiality of the misstatements alleged to exist in the answers of Miller, the judgment is reversed.

SUPREME COURT OF MISSOURI.

MARCH TERM, 1871.

Appeal from St. Louis Circuit Court.

THE CHARTER OAK LIFE INS. CO., *Resp't*,
vs.
 MATILDA BRANT, *App't*.*

Hitchcock & Lubke for Resp. Bland & Thornton for Hurek & Stagg. Napton & Clark for App't.

WAGNER, J.

This was a proceeding in the nature of a bill of interpleader brought up by the plaintiff against Matilda Brant, widow of Henry B. Brant, deceased, and Hurek and Stagg, praying to be allowed to pay into court the proceeds of a certain policy of insurance on the life of Henry B. Brant, deceased, and asking that the defendants be required to interplead in order to have a determination of their respective rights. The court below adjudged that Hurek as trustee of Stagg was entitled to the money, and from that decision Mrs. Brant appealed. The policy was issued for five thousand dollars, payable to the sole and separate use of Mrs. Brant, after the death of her husband. The annual premium was three hundred and forty-three dollars and ten cents, and the demurrer admits that the premium was paid by Brant. Brant in his lifetime borrowed money of Stagg and assigned the policy as collateral security. Mrs. Brant joining with him in the assignment, and he having died without making payment, the question now is whether the assignment concludes or bars Mrs. Brant from recovering the proceeds of the policy. With respect to reversionary choses in action and other reversionary equitable interests of the wife, in personal chattels, the doctrine has been for a long time well settled and in a manner most favorable to her rights, for no assignment by the husband, even with her consent and joining in the assignment, will exclude her right of survivorship in such cases. The assignment

* Decision Rendered March 27, 1871.

is not, and cannot, from the nature of the thing, amount to a reduction into possession of such reversionary interests; and her consent during the coverture to the assignment is not an act obligatory upon her. (2 Story, Eq. Juris, § 1413; *Wood vs. Simmons*, 20 Mo., 363; *Craft vs. Bolton*, 31 Mo., 355.)

But the question to be considered is whether this case falls within the above mentioned rule. If the policy was a chose in action or an equitable interest absolutely belonging to the wife, within the reasoning of the doctrine there could be no doubt; but the case is peculiar and distinguishable. It is an interest designed for her benefit, but the consideration immediately moves from the husband and is dependent on his action.

The statute in reference to married women provides that it shall be lawful for any married woman, by herself, and in her name, or in the name of any third person with his assent as her trustee to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life, and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, and for her own use, free from the claims of the representatives of her husband, or of any of his creditors; but such exemption shall not apply when the amount of the premiums annually paid shall exceed \$300. [2 Wagner St. p. 936 § 15.

The eighteenth section of the same act makes it apply to all policies, whether the same was effected by the wife herself or her husband for her benefit, either before or after the passage of the law, and provides for the inurement of the money to the separate use and benefit of the wife and her children, if any, independently of her husband and of his creditors and representatives.

This statute was copied from the New York law of 1840, and the construction which the courts of that State have given to it will be presently adverted to. A similar statute prevails in Wisconsin, and the Court there holds that where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise. (*Kerman vs. Howard*, 23 Wis. 108.)

The Court in its reasoning seems to have no doubt about the power of the husband with the consent of the company to change the policy, or to assign it as a means of credit or security; and that in a case where he had paid the premiums he would have the right to dispose of the policy in the absence of the statute, and it was not believed that the legislature intended to deprive him of it by that provision. In *Eadie vs. Slimmon* (26 N. Y. 9) it appears that the policy recited the payment by Mrs. Eadie of the premium for the first year, and for the like premium to be paid in advance every year thereafter. The company insured the life of the husband in the sum of two thousand dollars for her use and benefit. The husband and wife assigned the policy to Slimmon in payment of, or as security for an alleged indebtedness of the husband. Slimmon

threatened Eadie with a criminal prosecution for embezzlement; the wife was wrought on through fear, and thrown into the greatest agony, and the policy was assigned through apprehension of such a prosecution. After the death of the husband, Slimmon claimed the money on the policy, but the Court held the assignment void, having been extorted by force and coercion which overcame the free agency of the wife. This was the principal reason upon which the decision was based, though Mr. Justice Smith at the close of his opinion stated the policy was taken under the act of 1840; that it was the intent of that statute to make such policies a security to the family of a married man and a provision for their use and benefit; and that this interest would be defeated if they were held assignable by the wife like ordinary choses in action belonging to her in her own right, as her separate property.

Upon a motion for a re-hearing the Court adhered to its previous opinion, and Denio J. said that the statutory provision was special and peculiar, and looked to a provision for a state of widowhood, and for orphan children; and that it would be a violation of the spirit of the provision to hold that a wife, insured under the act, could sell and traffic with her policy as though it were realized personal property, or an ordinary security for money. But no doubt was expressed by the Court on either occasion about the assignability of the policy had no statute regulations intervened to render it invalid. It appears that there never was any serious doubt about a life policy being assignable, and it has been observed that without the power to assign the insurance on lives would lose half its usefulness. (Ang. in Fire and Life Ins. § 325 et seq.) At common law the insurable interest in the life of another person, must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. (3 Kent Com. 10th ed., 483, but see McKeevs. Phoenix Ins. Co., 28 Mo. 383.)

The statute, therefore, may be considered in the light of an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which in case she survive him, goes to her free from his creditors and representatives.

It also makes it lawful for a married woman herself, and for her own benefit to effect an insurance on the life of her husband, which shall belong to her and her children. The statute was founded in charity and intended to subserve a beneficial object, and in a case falling within it I should be disposed to give it the most favorable construction to carry out its humane purpose. But it is expressly provided that to secure the exemption or immunity on policies in favor of married women, the amount of premium annually paid shall not exceed three hundred dollars. The law did not intend that the husband should withdraw any greater amount from his means or his creditors to be expended for such a purpose. As the premium was greater in this case the policy is withdrawn from the operation of the statutes, and does not come within the provision

granting it an entire and absolute exemption in favor of the wife. As a policy not governed by the statutes, I entertain no doubt about its transferability, and the assignment having been voluntarily made by Mrs. Brant and her husband for a favorable consideration, with the assent of the company, I think it should be held valid and that the judgment should be affirmed.

Affirmed. The other judges concur.

SUPREME COURT OF WISCONSIN.

NATHAN N. MINER, *Resp't*,
vs.
 THE PHOENIX INS. CO., *App't.**)

DIXON, C. J.

The policy sued upon contained the usual condition found in such instruments, that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * then * * * this policy shall be void;" and the sole question in this case is whether the agent of the company was authorized to waive and did waive this condition, by accepting the premium and issuing and delivering the renewal receipt with knowledge at the time that the property had been sold and the title changed.

The premium was paid to and the renewal receipt made and delivered by George Bulkley, at Elkhorn, on the 7th of November, 1867. Bulkley subscribed his name thereto as agent. The complaint avers that Bulkley "was then said defendant's local agent at Elkhorn, aforesaid, and was duly authorized to issue and renew policies of insurance, and to receive the premium therefor in behalf of the defendant." This averment of the complaint is not denied by the answer, and of course stands admitted.

The court submitted the following question to the jury, upon which to find a special verdict, viz.: "Did Mr. Bulkley, the agent of the defendant, when he renewed the policy in question, November 7th, 1867, know that the legal title to the property therein mentioned had passed from Richmond to the plaintiff?" To this special question the jury answered, "yes;" and thereupon the court directed a general verdict for the plaintiff for the amount of damages proved.

The policy renewed was issued to one Richmond as owner of the property; the loss, if any, payable to the plaintiff and one

* Decision Rendered May 8th, 1871.

Wylie, mortgagees. The renewal receipt ran to Richmond, showing the premium to have been received of him per Wylie, thus continuing the policy in the same form. Richmond insured as owner, and loss payable to the plaintiff and Wylie, mortgagees. Before the renewal, Richmond's title had been extinguished by foreclosure, and the plaintiff and Wylie had become owners. They had purchased at the foreclosure sale upon the mortgages given to themselves. After the loss by fire, Wylie assigned his interest in the policy to the plaintiff who sues alone, and is entitled to the proceeds. It will be seen from this statement, that there was a verbal inaccuracy in the question submitted to the jury. Instead of submitting to them whether Bulkley knew the legal title of the property had passed from Richmond to the plaintiff, the submission should have been, whether he knew it had passed from Richmond to the plaintiff and Wylie. The inaccuracy is, however, of no importance, and is alluded to only for the purpose of explanation. It is very clear that the jury could not have misapprehended the question submitted or intended to be, which was whether the agent knew the title had passed from Richmond to the plaintiff and Wylie.

The question thus submitted to the jury, very much narrowed the issue presented by the pleadings and evidence before the court. It withdrew entirely from the consideration of the jury all that part of the case, and the testimony respecting the alleged statements and representations of the agent made to Wylie at the time of renewal and when the premium was paid by Wylie, that the change of title made no difference, that the policy as renewed was as valid and effectual to insure the interest of the plaintiff and Wylie as owners, as a new policy would be, issued to them in that capacity, and that no new policy was necessary. All that part of the case was withdrawn, and the only question of law which remained and now remains, is that above stated. It is whether the agent was authorized to waive and did waive the condition, by receiving the premium and executing and delivering the renewal receipt, knowing the change of title which had taken place.

The agent, as admitted by the pleadings, was authorized to issue and renew policies of insurance and to receive premiums therefor in behalf of the company at Elkhorn. He was, therefore, the general agent of the company, authorized to represent it, make contracts for insurance and transact its business at that place, according to the general practice and course of dealing of such corporations. He was authorized to make, and did make, the contract of insurance in question, for it was expressly provided by the policy that it should "not be valid unless countersigned by the duly authorized agent of said Phoenix Insurance Company, at Elkhorn, Wis." The strong tendency and decided weight of all modern authority is that agents so authorized and appointed, may waive any of the written or printed conditions of the policy and bind the company by such waiver, and that their representations

or statements made, or promise, assurance or verbal consent given to the assured at the time of issuing the policy, or when acting within the scope of their agency and with knowledge of the facts constituting the breach, will, if confided in and relied upon by the assured, who is himself innocent and makes no misrepresentation or intentionally conceals nothing, amount to such waiver and estop the company from taking advantage of the condition waived. The cases in which this doctrine has been held are very numerous. In *Viole vs. Germania Insurance Company*, 28 Iowa, 9, it was held that a condition in a policy of fire insurance, that, if the risk be increased by a change of occupation or other reasons within the control of the assured, without the *written* consent of the insurers, "the policy shall be void," might be waived *without writing*, and by any acts, declarations or course of dealing by a local agent of the insurers authorized as here to issue and renew policies and make contracts of insurance, and who, with knowledge of the facts constituting a breach of the condition, recognized and treated the policy as valid and led the assured to regard himself as protected thereby. In that case the agent was authorized to determine whether the risk was increased and to cancel the policy on account thereof, and the waiver was after the policy was issued, and not by acts or declarations at the time of its issue or renewal. It was held that no new consideration was necessary to support such waiver. At page 58 the court say: "It is difficult to conceive of an act in the prosecution of the business of insurance, which the officers of the companies can do, that cannot be done by the agent."

In *Franklin vs. The Atlantic Fire Insurance Company*, 42 Mo., 456, it was held that a condition in a policy, "if the interest of the assured in the property be other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," was waived and the company estopped, where the agent, before issuing the policy, or receiving the premium, and having notice from the assured that his interest in the property was not entire, unconditional and sole, and that there were encumbrances upon it, failed to express those facts in the policy prepared by himself, and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium. In that case the doctrine is affirmed that foreign insurance companies are bound by the acts of their agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.

In *Columbia Insurance Co. vs. Cooper*, 50 Pa. St. R., 331, the assured innocently represented that there were no incumbrances upon the property, which was machinery in a mill, but stated the facts that there were judgments on the land, which he did not think were liens on the personal property, and in which the agent concurred and returned to the company the application with the

answer that there were no incumbrances, but that the premises were leased. The court observed whether a particular piece of real estate is subject to the lien of judgments, and whether chattels are so connected with that real estate as to be part of the freehold, were questions which the assured did not profess to be able to answer, and which, if the company wanted answered, they should have sent a competent agent to investigate. They furthermore said that the assured "was not responsible for the blunders of the agent. If the agent returned that there were no incumbrances, when he had been informed there were judgments and a lease, he may have violated the 'conditions;' but no company has a right to select and send out agents to solicit patronage and business for its benefit, and then to saddle their blunders upon its customers."

And equally strong and decisive is the language of the court in *N. E. Fire and Marine Insurance Co. vs. Schettler*, 38 Ills., 166, where it was held that an agent, having power to receive premiums, would be presumed to have authority to give permission to the holder of a policy to remove the property insured to another locality, and having indorsed the consent in writing on the policy, for an enhanced premium, for the removal, the company was bound by it.

And so in *Peoria Marine and Fire Insurance Co. vs. Hall*, 12 Mich., 202, where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render it void, it was held that the agent taking the insurance might waive it without writing, and whether permission to keep it was indorsed, or intended or neglected to be indorsed, or not.

And the power of these agents and the extent to which they represent and may bind the companies is further shown by those cases, in which it has been determined that the company cannot avail itself of any misstatement or omission in the application, constituting a warranty on the part of the assured, where such application is prepared by the agent with knowledge of the facts, or he is intrusted by the assured to make the application, and that this is so even though the by-laws of the company made known to the assured, provide that the person taking the survey and preparing the application shall be the agent of the applicant. *Clark vs. Union Mutual Insurance Co.*, 40 N. H., 333; *Marters vs. Madison County Mutual Insurance Co.*, 11 Barb., 624; *Rowley vs. The Empire Insurance Co.*, 36 N. Y., 550; *Protection Insurance Co. vs. Harmer*, 3 Ohio St., 452; *Beal vs. The Park Fire Insurance Co.*, 16 Wis., 241; *Hough vs. City Fire Insurance Co.*, 29 Conn., 10; *Kelley vs. Troy Fire Insurance Co.*, 3 Wis., 268, 269; *Howard Fire Insurance Co. vs. Bruner*, 23 Pa. St., 50; *Ames vs. N. Y. Union Insurance Co.*, 14 N. Y., 253; *Plumb vs. Cataraugus Insurance Co.*, 18 N. Y., 392; *May vs. Buckeye Mutual Insurance Co.*, 25 Wis., 291. In such cases the neglect or mistakes of the agent are the neglect or mistakes of the company itself.

And the authority of a general agent is still further illustrated by those cases adjudging the receipt of premium upon a policy by

the agent after forfeiture or breach of condition and with knowledge thereof, is a waiver, (*Wing vs. Harvey*, 27 Eng. Law and Eq. R., 140; *North Berwick Co., vs. New England Fire and Marine Insurance Co.*, 52 Maine, 336); or the doing of any other act by the agent recognizing the policy as still in force and valid, (*Keeler vs. Niagara Fire Insurance Co.*, 16 Wis., 523); or that the agent may waive the printed condition that no policy shall be considered binding until the premium is paid and given a credit, (*Borhen vs. Williamsburg Insurance Co.*, 35 N. Y., 131; *Sheldon vs. The Atlantic Fire and Marine Insurance Co.*, 26 N. Y., 460; *Gait vs. National Protection Insurance Co.*, 25 Barb., 189;) or that he may bind the company by a parol agreement to renew; although the policy and the certificates of renewal declare that they shall not be valid until countersigned by the agent, and that it makes no difference that at the time of such agreement to renew the period for which the policy was issued had expired, (*Post vs. Ætna Insurance Co.*, 43 Barb., 357;) or that he may waive notice of additional insurance where the policy requires that the assured shall give notice thereof to the company and have the same indorsed on the policy, or otherwise acknowledged by the company in writing, (*Warner vs. Peoria Marine and Fire Insurance Co.*, 14 Wis., 318;) or that he may bind the company by new clauses or conditions inserted by him before issuing the policy, (*Gloucester Manufacturing Co. vs. Howard Fire Insurance Co.*, 5 Gray, 497.)

To the authorities thus referred to, many others differing in facts but not in principle, might be added, but it becomes tedious and unnecessary. Enough have been cited to show that it was competent for the agent in this case, to waive the condition that any change in title or possession shall render the policy void, and it only remains to be determined whether he did so waive it by receiving the premium and giving the renewal receipt knowing that such change had taken place.

The case of *Peoria Marine and Fire Insurance Co. vs. Hall*, 12 Mich., 214, broadly asserts the doctrine that mere knowledge by the agent issuing the policy or renewing it, and receiving the premium, of facts constituting a breach of any of its conditions, is a waiver by him and by the company of the condition so known to be broken. It is put upon the ground, that notice to the agent is notice to the principal, and that whatever the agent knows the company must be regarded as knowing, and that as it would be a gross fraud for the company, knowingly to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss, so it is equally a fraud, and their fraud, for the agent to do so, for his knowledge was their knowledge, and his acts their acts for all the purposes of the transaction. And the same doctrine is fully sustained by the following cases: *Campbell vs. The Merchants and Farmers' Marine and Fire Insurance Co.*, 37 N. H., 35; *Marshall vs. Columbia Mutual Fire Insurance Co.*, 7 Foster, 157; *Martin vs. Madison County Mutual*

Insurance Co., 11 Barb., 624. In 37 N. Y., 48, it is said that the applicant, unused to business and ignorant of what is necessary to be done, trusts to the skill, knowledge and judgment of the agent, and puts full confidence in and relies upon him to see that the business is correctly done, and that, if he acts honestly and in good faith, the company ought to be charged with a knowledge of all the facts that are known to the agent, that it would be unjust to the insured, after he has made the application, paid the premium demanded and the expenses of the policy, to permit the company, upon the destruction of the property, to say that they will not make good the loss, because their agent, whom they have authorized to act for them, has failed in the performance of his duty. That the agent knows the requirements of the company and the insured does not, and if the application or policy be defective, upon a point well known to the agent, the company, and not the insured, should be the sufferers.

We are well satisfied of the soundness of these decisions and of the reasons which are given for them, and must therefore hold, that the condition in question was waived when the agent accepted the premium and issued the renewal receipt, knowing the change of title which had been made, and that as such change did not affect the insurable interest of the parties for whose benefit the policy was issued, and who paid the premium, the recovery in this action must be affirmed.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

GEO. NORTROP, ADM'R, *App't.*

Ag't.

THE RAILWAY ASSURANCE CO., *Resp't.* *

GROVER, J.

It must be conceded that the injury received by the plaintiff's intestate does not come within the strict literal words of the contract of assurance. By that contract the respondent agreed to pay the legal representatives of the intestate, in the event of her death from personal injury, ensuing in three months from the happening thereof, when caused by any accident while traveling by public or private conveyances provided for the transportation of travelers, &c. The intestate was not actually traveling upon any public or private conveyance provided for the transportation of passengers, at the time of receiving the injury which caused her death. It ap-

* Decision Rendered Jan. 20th, 1871.

pears from the facts agreed upon by the parties, that the intestate prior to such time had undertaken to go a journey from Steuben to Madison county; that the mode adopted for making the journey was, by rail from Steuben to Watkins in Schuyler county, thence by steamer to Geneva, thence by rail to Madison; that the intestate, in the prosecution of such journey, had arrived at Geneva, on board the steamer, and, as usual, was passing on foot from the steamboat landing to the railway station, to go on board of the cars for the remainder of her journey, and, while so passing from the landing to the station, a distance of about seventy rods, she slipped and fell, thereby receiving an injury which caused her death about four days thereafter. It further appears that upon the arrival of the boat at Geneva, there were usually hacks at the landing seeking passengers for any part of the village, or the railroad station; but that a large majority, going to the railroad station, went there on foot.

The question for determination is, whether at the time of receiving the injury the plaintiff was, within the meaning of the policy, traveling by a public or private conveyance. The policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language used, construed in the light of well known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into. One fact of this character, very important in the present case, is, that of the frequent changes required from one train of cars to another at intermediate stations upon the same journey.

Those passing from Buffalo or the Falls to New York, by the N. Y. Central, or from the former or Dunkirk to the same, by the Erie, cannot be unaware of this fact. Can it be said that a passenger is not traveling, within the meaning of this contract, by public conveyance while passing from one train, to go on board of another, in the actual prosecution of his journey; or, for further illustration, can this be said of a passenger from New York to Dunkirk, by the Erie, while going from the Ferry boat at Jersey City to get on board of the train at that place? I think that such passenger, within the meaning of this contract, and also within the fair construction of the language, is a traveler by public conveyance all the way from New York to Dunkirk, although he may walk as short distance from the Ferry boat to the train at Jersey City, or from one train to another, where such changes are made at intermediate stations.

An injury received while so necessarily walking in the actual prosecution of the journey, is received while traveling by public conveyance, within the meaning of the policy, as such walking is the actual and necessary accompaniment of such travel.

There is no difference in principle between a passenger walking and the intestate in the present case. The presumption is, that

the railroad trains and the steamer run in connection, the same as the Ferry boat from New York to Jersey City with the Erie trains, and that by means of this connection the journey of the intestate was designed to be continuously prosecuted, and it surely can make no difference in principle that the space to be walked over, in going from one conveyance to another, is a few steps more or less. Nor does it affect the question that the intestate might have procured a hack to carry her, had she so have chosen. She pursued the same course that the great majority of passengers did. This she had the right to do under the contract. Theobald *ag't* Railway Passengers' Assurance Co., 26 Eng. Laws and Equity, 432, sustains this view. In that case the assurance was against railway accident, whilst traveling in any close carriage or any line of railway in Great Britain, &c. This was held to include an injury received from slipping on the step of the car, while standing at the station, in getting out. It follows that the judgment appealed from, must be reversed and a judgment of \$5,000, with interest thereon from the time the loss became payable, rendered in favor of the appellant, against the respondent, together with costs in this and in the Supreme Court.

Church, Ch. J., Peckham & Rapallo, J. J., concur with Grover, J. Folger does not sit. Allen, J., not voting.

Judgment reversed.

COURT OF APPEALS OF NEW YORK.

LUCIUS BRADLEY, Ex'r, &c., *App't*,

vs.

THE MUTUAL BENEFIT LIFE INS. CO., *Resp't*.*)

GROVER, J., *J. Grover*

The death of Mathew J. Cluff, whose life was insured by the policy in suit, having been proved, the question arose whether his death occurred under circumstances bringing the case within the proviso, making the policy void in case the death happened under the circumstances specified therein. The proviso declares the policy shall be null and void in case the said Mathew J. Cluff shall die, among other causes, by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States, or of the United States, or of the said Provinces, or of any other country which he may be permitted under this policy to visit or reside in. The counsel for the appellant has ably discussed

* Decision Rendered April 25th, 1871.

the meaning of the word "*in*," as showing the construction to be given to the phrase: "known violation of any law of these States," &c., and has shown that the word may express various relations, those of time, place, and condition being the most common; but that sometimes it may express the relation of cause and effect. This shows, not that the relation expressed is shown by this particular word, but rather by the other words of the sentence in which it occurs. It is insisted by the counsel for the appellant that in order to bring the case within that part of the proviso, the death must occur, or the cause thereof happen, while the assured is engaged in the known violation of the criminal law of the State, and that the proviso does not include the known violation of a law for the protection of the civil rights of parties, the only sanction of which is a civil action for redress.

This was so held by the Supreme Court of Massachusetts, in *Cluff* against the present defendant, 13th Allen, 308, which was an action upon another policy, issued by the defendant, containing a proviso, similar in all respects to that in the policy now in suit. That conclusion was arrived at by the learned court by an application of the maxim "*noscitur a sociis*." How this maxim can apply to the present case, or if applied, how the conclusion deduced by the court therefrom follows, I am unable to perceive. Among the associates is that of the death happening by reason of intemperance from the use of intoxicating liquors. It is obvious that if the death happened from this cause, the case would come within the proviso, whether such use of intoxicating liquors was prohibited by the criminal law of the State where it occurred, or not.

Applying the maxim to this, it might with equal propriety be argued that it was not the criminal law that was had in view by the parties, as that it was such law, because death by the hands of justice is also included in the same proviso. To arrive at the intention of the parties to the contract, we must consider the subject matter in reference to which the language was used. That was the risk to be incurred by the defendant in insuring the life of *Cluff*. From the policy it appears that the defendant was willing to assume all the general risks to be incurred by such assurance to the extent of the amount insured. From the proviso it appears that the defendant was unwilling to incur, and therefore refused to assume the additional risk to his life incurred while the assured was engaged in the prohibited acts specified in the proviso, and therefore carefully provided that it should not be liable in case of death while engaged in the prohibited acts. Keeping these considerations in view, there will be but little difficulty in arriving at the intention of the parties, and consequently at the correct construction of the proviso. It is obvious that the violation of law in which the assured is engaged, whether such law be criminal or civil, must have some connection with the death as cause and effect; not necessarily the immediate cause, it is sufficient if it puts in operation that cause. To illustrate: the sale of lottery tickets is

prohibited by the criminal law of New York. No one would contend, that had the assured died in the State of New York, from heart disease, while engaged in selling lottery tickets, the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. Again, the criminal law of New York prohibits profane cursing and swearing; suppose the death happened from some accident while the insured was violating this law, would this bring the case within the proviso? Clearly not, for the reasons above stated. Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured; the case would come within the proviso, for the reason that the risk was increased, and the death caused by the violation of law by the assured, although such law was the civil, only the deceased having committed no breach of the peace or any indictable offence. The Massachusetts court held in the same case, when again before it, 99th Mass., 318, that the case would have come within the proviso, had the assured, at the time of being shot, in furtherance of his attempt to get the horses from Cox, been committing an assault and battery upon him. The court, I think, must have overlooked the fact that the violation of law, in which the assured was engaged, was eminently calculated to cause violence, dangerous to his life, to be inflicted upon him, and that the very object of the proviso was to exonerate the defendant from liability, should death occur from this voluntary increase of risk. It follows that where the death occurs during the known violation of law by the assured, where such violation imminently tends to violence dangerous to his life, the case comes within the proviso.

It requires but a bare statement of the facts, as to which there was no conflict in the evidence, to show that Cluff was engaged in such known violation of law at the time he received the fatal shot, causing his death in a few moments. He went from Massachusetts to Louisiana, early in the Winter of 1863-4, and in January or February of that year, leased a plantation within the lines occupied by the Federal troops, of which one Cox was in possession, but by what title did not distinctly appear. Cox and his family resided in a house upon the plantation, and his stock even kept upon the plantation and consumed some of the feed thereon. Cluff obtained possession of a part of the plantation, and made efforts to obtain possession of the residue, but what he did in this respect does not appear. Cox left home, leaving his family in his house, and his son, a boy seventeen or eighteen years old, in charge of his affairs. Cluff made out a bill of what he claimed on account of the stock being upon the premises, and caused the same to be delivered to a woman at Cox's house. A few days after, young

Cox was going along the road with a pair of horses and wagon loaded with barrels of water. Cluff, upon being informed who it was, called to him to stop, and he did so. After some conversation, not material, Cluff asked the boy when he was going to pay the bill. The boy replied that he was not going to pay it at all. Cluff then said if he did not he would take the horses and start. The boy replied he had better begin now. Cluff said if you think I cannot take them I will show you, and thereupon went to the barn and unhitched the traces, siezed the lines, and told the boy to give them up, which he refused to do. Cluff then took out a pocket-knife to cut the lines. The boy told him not to do that. Cluff desisted from that, went to the horses heads and commenced unfastening the lines from the bridle. The boy jumped from the wagon, went behind it, drew a pistol and fired at Cluff, hitting him in the side, causing his death in a few moments.

That Cluff knew he was violating law is a proposition too plain for argument. The law of no country would justify his proceedings, which he must have known. This act was imminently calculated to lead to violence, dangerous to his life, and also that of the boy. The case was thus brought directly within the proviso.

The rule in this State is that where facts are proved either by undisputed evidence, or such a preponderance of evidence as to require the court to set aside a verdict finding to the contrary, it is the duty of the court to assume the truth of such facts, and determine the legal rights of the parties upon such assumption. In Massachusetts, it appears from the opinion of Foster, Judge, 13th Allen, 316, *supra*, that the rule is different. He says, "to establish this defence, the burden of proof was upon the company, notwithstanding the evidence tending to prove a forfeiture came from the plaintiff's own witness."

The case could not be withdrawn from the jury, or a verdict for the defendant directed, because the defence rested upon the affirmative proposition which the company was bound to maintain. The judgment of the General Term, affirming that of the Circuit, dismissing the plaintiff's complaint, must be affirmed with costs.

~~DISSENTING~~ OPINION.

RAPALLO, J.

The question directly presented by this appeal is, whether upon the evidence adduced at the trial, any question of fact arose which should have been submitted to the jury.

The counsel for the plaintiff insisted that, whether Cluff came to his death under such circumstances as to defeat a recovery, was a question for the jury, and also requested the court to submit to the jury the question, whether the death of Cluff was a reasonable, rightful or excusable result of any known violation of law by him.

But the court declined to submit that question to the jury, and decided that there was no question of fact in the case for their determination, and dismissed the plaintiff's complaint. Exceptions were duly taken to these decisions.

To justify this disposition of the case it must clearly appear that it was established upon the trial, by uncontroverted evidence, that the death of Cluff happened under such circumstances as to fall within the excepted risks mentioned in the proviso contained in the policy.

The first step in the inquiry is the construction of this proviso.

The exact interpretation to be given to the words, "in case he shall die * * * in the known violation of any law of these States," &c., has been the subject of serious debate. In another action upon a like policy of the same company on the life of the same party, which was tried four times in the State of Massachusetts, the Supreme Court of that State, in a carefully considered opinion, held that the proviso must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespasses against property, or infringements of civil laws to which no criminal consequences are attached. *Cluff vs. Mutual Benefit Life Ins. Co.*, 13 Allen, 308, 316, 317, S. C., 99 Mass., 318. This conclusion is based by that learned court upon the natural import of the words, "known violation of law," and upon their being found immediately following the words, "by the hands of justice."

A similar construction was adopted by the Supreme Court of Missouri, in the cases of *Harper's Administrators vs. The Phœnix Ins. Co.*, 19 Mo., 500, and 39 Mo., 122, and the case of *Praisted vs. The Farmers' Loan and Trust Co.*, 4 Seld., 299, has some bearing in the same direction.

The Supreme Court of this State, whose decision is now under review, does not agree to the interpretation given to the proviso, by the courts of Massachusetts and Missouri; and a difference of opinion exists between the members of this court, as to whether the proviso applies only to violations of criminal law, or whether it embraces all illegal acts of such a character as to lead to violence. But independently of that question, and whatever be the nature of the violation of law urged by the insurance company, as avoiding the policy, it seems to be clear that a relation must exist between the violation of law, and the death, to make good the defence. That the death must have been caused by the violation of law, to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that at the time of the death the assured was violating the law, if the death occurred from some cause other than such violation.

This position is fully sustained by the opinions of the court in the Massachusetts case, and seems to be conceded by the opinion

of the Supreme Court in the case now under review; nor do I understand it to be controverted by the members of this court who differ from the result at which I have arrived.

The more difficult question arises at the next step in the inquiry, namely: Whether conceding that the act of Cluff in attempting to detach the horses of Cox from the wagon, was unlawful, and known by him so to be; the fact that his death was caused by that act, was so clearly established by uncontroverted testimony, as to justify the court in withdrawing the case from the jury, and dismissing the complaint.

In examining this question, it is necessary to throw out of view all circumstances as to which the evidence was conflicting, and to look at the facts in the most favorable light for the plaintiff, in which the jury would have been at liberty to find them.

If any view of the facts, which the jury would have been justified in taking, would have sustained a verdict for the plaintiff, the dismissal of the complaint was erroneous.

Two witnesses, only, were examined as to the circumstances under which the death occurred. One of them (Scott) testified to a struggle between Cox and the deceased, and a blow inflicted by the deceased upon Cox, which was followed by the shot. The other witness (Doctor Bugbee) testified that he was the nearest person to the parties, and thought he saw all that occurred; but that he saw no scuffle or striking, and he states, positively, that the deceased did not assault Cox, or threaten him; that the only threat was to take the horses, and there was no threat of personal violence on either side. That Cox was not beaten by deceased, nor personally attacked or assulted. That after deceased had got possession of the lines, Cox (who had previously jumped from the wagon) started for the house, leaving Cluff standing by the heads of the horses. That when Cox got to the rear of the wagon, he turned, drew a revolver and shot deceased, and then cocked his pistol to fire again, but hearing deceased say that he was hit, did not shoot again, but ran for the house. That Cluff died in the arms of the witness, without uttering a word.

The jury were at liberty to adopt the statement of whichever of these witnesses appeared to them most credible. Although negative testimony is ordinarily of less weight than positive; yet it is not to be disregarded, but the jury have a right to consider it; and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things, that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of one or the other of the witnesses.

Adopting the version of the transaction given by Dr. Bugbee, as the jury might have done had the case been submitted to them, and considering his statement in connection with the other facts proved, bearing upon the relations existing between Cox and Cluff,

can it be said that, beyond all question, the act of Cox, in firing upon and killing Cluff, was caused by his attempt to take the horses, and was not an unjustifiable and wanton act prompted by feelings of malice and revenge? It is not enough to say that if Cluff had not made the attempt, he would not have been killed. The killing must have been a natural and reasonable consequence of the attempt, to warrant a decision that it was caused thereby. Cluff's going to Louisiana, and his taking a lease of the farm, were links in the chain of circumstances which ended in his death. If he had not done those things he would not have been killed as he was. Yet it would not be reasonable to say that those acts were the causes of his death.

In the *Bank of Ireland vs. Trustees of Evans Charities*, 5 House of Lords Cases, 410, the fraud could not have been perpetrated if the trustees had kept the seal securely; yet it was held that negligence in the custody of the seal was too remotely connected with the fraud to render the trustees liable, for as the court says: "The transfer was not the necessary or likely result of that negligence."

The proximate and not the remote cause must be regarded. The immediate cause of the death was the shooting, and if Cluff so conducted himself, that the shooting was a natural, reasonable and legitimate consequence of his acts, then it may be said that they caused the shooting. But if Cox fired with intent to kill, and his act was wholly beyond the scope of lawful resistance to the trespass of Cluff, and the provocation given by the latter was totally inadequate to excite or justify the character of violence which was used; and if the circumstances of the killing were such that rational men would attribute it to wanton malice, rather than to an endeavor to resist aggression, or even to natural indignation, then, although the deceased was in the wrong in the first instance, his wrong was but a remote and not a proximate cause of the death, and other causes for which he was not responsible, intervened.

Some analogy is afforded by the common law rules in respect to acts of provocation, which will reduce a homicide from murder to manslaughter. In the *Commonwealth vs. Drew*, 4 Mass., 396, Chief Justice Parsons states, as a rule of law, that a trespass barely against the property of another, not his dwelling house, is not a provocation sufficient to warrant the owner in using a deadly weapon, and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; and, as a general rule, every willful and intentional killing, without a justifiable cause, if done with deliberation, and not in the heat of passion, is murder, and legal malice is always implied in such cases. *Per Walworth, Ch. J.*, 2 Park, Cr. R., 28. Here it was not even left to the jury to say whether the killing was in the heat of passion. If the acts imputed to Cluff, though illegal, were not sufficient inducement to the homicide, even to reduce the grade of the offence, it can hardly be said that they were the

cause of his death. The diversity in the statements of the witnesses, as to the circumstances of the killing, and the necessity of an inquiry into the motive which actuated Cox, render it impossible to determine, as a question of law, that the killing was a reasonable or natural consequence of the acts of Cluff.

So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding, that the provocation proved was cause of the killing, and in withdrawing that question from the consideration of the jury.

The learned court in Massachusetts express the opinion, that if Cox shot Cluff, not in the course of the affray, but merely to revenge himself for what had been done, the case would not be within the proviso. 13 Allen, 818.

This distinction is reasonable, and seems to be applicable whether Cluff's violation of law were criminal or not.

If Cox abandoned the horses and started for his home, and afterwards changed his mind, turned and maliciously shot Cluff, that was a new and independent event. There was some evidence to sustain that theory of the case. Bugbee testifies that Cluff got possession of the lines, and Cox started for the house, Cluff still standing by the horses' heads. That when Cox got to the rear of the wagon, he turned, drew a revolver and shot Cluff, and cocked his pistol for a second shot, when finding that Cluff was hit, he ran away.

It was impossible for the court to say, on this evidence, when Cox first formed the design of shooting, and that he did not intentionally and maliciously take the life of Cluff to satisfy his own feelings of revenge, after the seizure of the horses had been effected, and he had abandoned them. The accuracy of the aim, and the attempt to fire a second shot, at an apparently unarmed man, were circumstances from which malice could be inferred. Furthermore, there were circumstances from which a hostile state of feeling, on the part of Cox, could be inferred, independently of the taking of the horses.

Cluff was turning the family of Cox off the farm, was hurrying their departure, and insisting upon their paying for the feed consumed by their cattle, and the tone of the conversation between Cluff and Cox evinced an angry state of feeling, which may have contributed, quite as much as the taking of the horses, to the deadly assault made by Cox.

Under all these circumstances, I think that the case should have been submitted to the jury, as requested by the plaintiff's counsel, to determine, under proper instructions, whether the death of Cluff was caused by a known violation of law on his part, and whether the act of Cox, which produced the death, was a natural, reasonable or legitimate consequence of the acts of Cluff. The determination of these questions involved so many doubtful questions of fact, that they could not properly be disposed of by the court.

One witness testifies to a personal conflict. The other denies it. If the first witness is to be believed, the blow struck by Cluff may have been the provocation for the shot. But the court could not act upon that statement, because it was contradicted. Under that state of the evidence, to decide the controversy by saying that if the blow was not struck, the seizure of the horses was the cause of the shot, is subject to the objections, not only that it disposes of the case upon a hypothesis, and without ascertaining the actual facts, but that it involves a disregard of the circumstances tending to show that the shooting was with intent to kill, and a willful and deliberate act of malice or revenge, and does not even leave it to the jury to determine whether the killing was in the heat of passion, caused by the act of Cluff. It would hardly be contended, that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall within the proviso, for no one would hesitate to say that in the case supposed, the unlawful act of the deceased was a totally inadequate cause for the killing. Yet, between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases involving different degrees of provocation, which cannot be measured, so as to determine as matter of law, their adequacy to produce a fatal result; and it can hardly be laid down as a rule of law, that an attempt to take one's horses for debt, without process, but without any threat of personal violence, is of itself an adequate cause for intentionally killing the offender, and that a killing during or immediately after such an attempt must necessarily be held a legitimate consequence of the act. Such an act may lead to violence, and if any act of violence of the character which would naturally be resorted to as a measure of resistance, should result in death, the necessary connection between the original illegal act and the death, might be established. But the intentional killing of another, with a deadly weapon, under such circumstances, is a totally different affair, and cannot be held, as matter of law, to be a natural or reasonable result or consequence of the original offence. It follows that the uncontroverted facts were not sufficient to justify a dismissal of the complaint, and that the case should have been submitted to the jury with proper instructions.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

COURT OF APPEALS OF NEW YORK.

THE SPRINGFIELD FIRE AND MARINE
INS. CO., *et al*, *Resp'ts*,
Ag't
ORLANDO BROWN, *et al*, *App'ts*.*

ALLEN, J.

The parties to the policies of insurance have, by the terms of their contract, avoided some of the questions which have embarrassed the courts and led, in some instances, to an apparent conflict of opinion, if not of decision. The rights of the mortgagees are protected against the effect of certain acts of the mortgagor, in derogation of the policies, by an agreement that the policies as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, with the qualification, however, that if the mortgagee fail to notify the insurers of any change of ownership after the same shall have come to his knowledge, the policies shall be void.

They have definitely determined the question, perhaps not definitely settled by adjudication, as to the right of subrogation by an agreement, making part of the contract of insurance, that whenever the insurers shall pay to the mortgagee any sum for loss, for which loss the company would not have been liable to the mortgagor or owner, the insurers shall be subrogated to the rights of the mortgagee, and entitled to an assignment of the mortgage. This provision is probably in accordance with the legal and equitable rights of the parties regarding the policy from the time it might become void as to the mortgagor, as an insurance existing only in favor and for the benefit of the mortgagee, and as an insurance upon his interest as mortgagee, and not as an insurance upon the property generally, although the doctrine has been questioned in *King vs. State Mutual Ins. Co.*, 7 Cush., 1, Sec. 2 Phil. on Insurance, §§ 1512, 1712; *Kernochau vs. N. Y. Bowery Fire Ins. Co.*, 17 N. Y., 428; *Roberts vs. Traders Ins. Co.*, 17 W. R., 631; *Carpenter vs. Washington Ins. Co.*, 16 Peters, 495; *Tyler vs. Aetna Ins. Co.*, 12 W. R., 507, and S. C., 16 W. R., 385, per Chancellor.

If then the mortgagor who was the party primarily insured, could not for any reason have enforced the policies and recovered thereon for his own benefit, either as owner, or as having an insurable interest as the mortgagor, personally liable for the payment of the mortgage debt, he is precluded, by the terms of the policies,

* Decision Rendered Jan. 24, 1871.

from claiming the benefit of the insurance, in satisfaction of the mortgage debt, and the insurers are entitled to be subrogated to the rights of the mortgagee. The mortgagee was equitable assignee of the policies containing a provision, which, upon the happening of certain events, should absolutely vacate and avoid the insurance as of the property generally, and as a contract of indemnity to the mortgagor, and resolve it into an insurance of the interest of the mortgagee as such, and make it a personal contract with her, in which the mortgagor would have no interest. Per Shaw, Ch. J.; *King vs. State Mutual Fire Ins. Co.*, 7 Met., 1; Per Story, J.; *Columbia Ins. Co. vs. Lawrence*, 10 Peters, 517.

Ferris, the grantee of the premises and owner of the equity of redemption, can, as the representative and equitable assignee of Allen, claim no greater rights under the policies than his grantor and assignor, Allen, could have claimed. *Grosvenor vs. Atlantic Fire Ins. Co.*, 17 N. Y. R., 391.

The policies were made and accepted by Allen, the insured, with full knowledge of and subject to all the terms and conditions expressed therein, and he had personal knowledge of every fact and circumstance affecting their validity existing at the time they were made, and was a party, and assenting to every act which has been alleged as breaches of the conditions of the policies, and as avoiding them, as to him and all (except the mortgagees) claiming under him.

One of the conditions of each of the policies was, that in case of any change or transfer of title in the property insured the policy should be void and cease.

A contract of insurance, like every other contract, must be so construed as to give effect to the intent and understanding of the parties, and the language employed must be taken in its ordinary popular sense, unless it appears to have been used in a technical sense, or custom or usage has impressed a different meaning upon it. 1 Phil. on Ins. § 122, and see *Whiton vs. Old Colony Ins. Co.*, 2 Met., 1; *Mutual Safety Ins. Co. vs. Hone*, 2 Comst., 235.

Every part of a policy should be read and construed in obedience to this rule. There was a change and transfer of the title of the property which was the subject of insurance, after the insurance was effected, and before the loss.

If the words employed were used in their popular sense, this condition of the policy was violated, and the policy, as an insurance of the property generally, and for the benefit of mortgagor and owner, ceased. Had the parties intended only to provide for a change in, or transfer of, the interest of the assured, which in one sense is "the property assured," it may be assumed that language more appropriate to express the idea would have been chosen.

An insurable interest may exist without any estate or interest in the corpus of the thing insured.

As guarantor of the mortgage debt, personally liable for its payment, Allen probably had an insurable interest in the buildings

upon the mortgaged premises. *Gordon vs. Massachusetts Fire and Marine Ins. Co.*, 2 Pick., 249; but it was an interest that would not ordinarily and popularly be classified as "property," and any change in such insurable interest would not be spoken of as a change in, or transfer of, title.

The insurable interest would cease by a discharge of liability for the mortgage debt.

"Title" has respect to that which is the subject of ownership, and is that which is the foundation of ownership; and with a change of title, the right of property—the ownership passes.

"Property" is a thing owned, that to which a person has, or may have, a legal title. Both words are inappropriate to describe the insurable interest, which exists solely by reason of the personal liability of the insured for the payment of a sum of money charged upon the building or goods insured.

The word "property" may have different meanings, depending upon the connection in which, and the purposes for which, it is used, as indicating the intention of the parties. In *Whiton vs. Old Colony Ins. Co.*, 2 Met., 1, it was used as a part of the description of the subject matter of the insurance, and was held to include current bank bills as within the intention of the parties, as manifested by the contract and the circumstances under which it was made.

Acting upon the same principle of interpretation, it was held that an insurance of property did not cover freight, except as it was to be paid by a specific portion of lumber which was on board the vessel, and which the assured, as carrier, was to receive for freight. It was held that the contract gave the insured an interest in that part of the cargo coming within the term "property," but that the freight upon the other parts of the cargo was not within the term as used. *Wiggin vs. Mercantile Ins. Co.*, 7 Pick., 271. To the same effect in *Holbrook vs. Brown*, 2 Mass., 280.

In the clause of prohibiting double insurance, the prohibition is generally in terms so restricted in its application, that "property" can mean nothing else but the interest of the assured, whatever that may be. As in the *Massasoit* policy, before us, the condition is, "if the insured, or his assigns, shall hereafter make any other insurance on the *same property*," &c., thus preventing a double, and possibly fraudulently excessive, insurance of the same interest. Neither the policy of the law or the contracts of insurance forbidding, but permitting as many several insurances upon the same property as there are separate insurable interests.

As mortgagor and mortgagee have several interests in the same property, and each may insure to the extent of his interest, the insurances will not be double, and neither will be in violation of the clause forbidding other insurances. Both will be valid.

The policy of the law is to prevent insurances in excess of the value of the thing insured in favor of the same party, and against the same risks; and hence the restrictive clause, whatever its form, unless its language clearly demands a different interpretation,

should be held as operative to this extent only; and the term "property" in such clause means the interest of the assured. 2 Phil. on Ins., § 1250. *The Traders Ins. Co. vs. Robert*, 17 Wend., R. 631; *Godin vs. London Assurance Co.*, 1 Burr, 489; *Mutual Safety Ins. Co. vs. Hone*, 2 Comst., 235.

The interest of Allen, by reason of his personal liability for the mortgage debt, was properly insured by an insurance of the property; and it was not necessary that the particular interest should be specified. It was enough that he had a pecuniary interest in the preservation and protection of the property, and might sustain loss by its destruction.

Neither was it necessary that the nature of the interest should be disclosed to the insurers. *Tyler vs. Aetna Ins. Co.*, 12 Wend. R., 507.

When the word "property" is used in the clause forbidding alienation, it is used to designate the thing insured, and not the interest of the insured.

Where a special interest, rather than the general property, is the subject of insurance, no such condition is necessary to the protection of the insurer, for the reason that with a loss of interest the insurance ceases. *Carpenter vs. Washington Ins. Co.*, *supra*; and an interest in the policy does not pass by a transfer of the interest insured. *Columbia Ins. Co. vs. Lawrence*, 10 Peters, 507; 1 Phil. on Ins., § 86.

But if the owner is insured generally, and transfers the property, retaining a lien for the purchase money, or other special interest, the insurance will continue to the extent of the interest remaining in the insured, if it does not contravene some condition of the policy. 1 Phil. on Ins., §§ 89, 90, 880.

As some evidence of the sense in which the term "property" is used in the clause under consideration, it is worthy of remark that where the policy is upon a special interest in favor of a mortgagee, and it is designed to save the policy from the effect of a breach of the condition forbidding a change of title, it is done by a special clause of exception, as in this case, and in *Hampden Fire Ins. Co.*, 10 Allen, 281.

The policies before us are, in form, upon the property generally, and in favor of Allen as owner. In one of the policies the insurance is in his favor "as owner," and in both it is "upon his two four story brick stores," &c.; and the insurers had, as found by the judge on the trial, no notice or knowledge of any conveyance of the property by Allen.

The insurers only knew Allen as owner, and the policies must be interpreted as if they were upon the interest of Allen as owner, and upon the property generally, in fact as they were in form. They were the insurers of Allen as owner, and Miss Williams as mortgagee, to the extent of her mortgage debt; and both interests are represented and cared for in the policies.

The change or transfer of title in the property insured, intended

in the clause under consideration, was the title, the ownership of the thing insured, and upon such transfer or change, the policy ceased, and became void as to the principal party insured; and but for the saving clause in favor of the mortgagee, would have been void as to her. *Grosvenor vs. Atlantic Fire Ins. Co.*, 17 N. Y., 319; and see *Jackson vs. Massachusetts Mutual Fire Ins. Co.*, 23 Pick, 418; *Tillon vs. the Kingston Mutual Ins. Co.*, Selden, 405. The case last cited may be regarded as greatly shaken, if not overruled, by *Grosvenor vs. Atlantic Fire Ins. Co.*, *supra*, as far as it sustained a policy in favor of the mortgagee and equitable assignee, which could not have been enforced by the mortgagor or assignor; but upon the other points decided it has not been questioned.

In the elementary treatises, this clause is treated as relating to a transfer or alteration of the insured, subject to the thing insured; 1 Phil. on Ins., § 880; and the question has been as to what constituted an alienation. See cases cited in 1 Phil. on Ins., *supra*, in notes.

The change of title to the property, by the conveyance to Ferris, was a breach of the condition which avoided the policies as to Allen, the mortgagor.

It is first provided, that upon an assignment without the consent of the whole policies, or of any interest in them, the liability of the insurer shall cease; and then follows the very general clause prohibiting "any sale, transfer, or change of title in the property;" and, by another clause in the policies, it is provided that if the mortgagee should neglect to notify the insurers of any *change of ownership of the property insured*, after the same should come to his knowledge, the policy should be void;—all indicating clearly that the parties used the term "property" in its popular sense, and that the change of title referred to was of the thing insured, of which the mortgagee might have no knowledge, and not of the mortgage interest of which she would necessarily have knowledge.

The mortgagor could not have recovered upon the policies, and it follows that he is not entitled to have the moneys paid, under the policies to the mortgagee, applied to the satisfaction of the mortgage.

The judgment should be affirmed with costs.

STATUTE LAWS.

CONNECTICUT.

AN ACT in addition to and in alteration of "An Act concerning Communities and Corporations."

Be it enacted by the Senate and House of Representatives in General Assembly convened:

§ 1. The Governor, by and with the advice and consent of the Senate, shall appoint some suitable person, not a director, officer or agent of any insurance company, to be Insurance Commissioner; who shall, unless sooner removed by the Governor for cause, hold his office for the term of three years, and until his successor is appointed and qualified. In case of a vacancy in said office by death, resignation or otherwise, while the senate is not in session, the Governor may fill such vacancy by appointment till the next session of the General Assembly.

§ 2. It shall be the duty of the Insurance Commissioner to see that all the laws of this State respecting insurance companies are faithfully executed, and to exercise and discharge all the powers and duties of supervision of such companies as are now, or may hereafter be provided by law.

§ 3. The salary of the Commissioner of Insurance of this State shall be three thousand five hundred dollars per annum and his necessary expenses while attending to his duties outside of the city of Hartford; and the said Commissioner is empowered to employ sufficient clerical aid for the proper discharge of his duties; the salary of the Commissioner shall be paid from the treasury, also the incidental expenses of his office after his accounts shall have been audited and allowed by the Comptroller, and the fees which the said Commissioner of Insurance is now or may hereafter be authorized by law to receive from insurance companies, shall hereafter be paid over by him to the Treasurer of this State for the use of the State; and the amount so received and paid over shall be by him stated in his annual report to the General Assembly. The Commissioner of Insurance shall have power to administer oaths in the discharge of his official duties.

§ 4. The Comptroller of this State and the present Insurance Commissioner are hereby directed to deliver to the Commissioner of Insurance to be appointed, as provided by section 1st of this act, all the books and papers now in his custody relating to insurance.

§ 5. The Insurance Commissioner shall demand and receive the following fees from insurance companies:

For receiving and filing annual report of insurance companies chartered by this State, ten dollars.

For valuation of policies of life insurance companies, one cent for each thousand dollars insurance valued.

For filing any additional paper required by law, twenty-five cents each.

For certificate of valuation, copy of report, or certificate of condition of company to be filed in other States, five dollars.

§ 6. No fire insurance company organized under a charter granted by this State, or doing business in this State, shall expose itself to any one loss on any one fire risk or hazard, to an amount exceeding ten per centum of its paid-up capital.

§ 7. It shall be the duty of the President or Vice President, and Secretary of each fire and each fire and marine insurance company incorporated by this State, annually in the month of January, to prepare under their own oath, and deposit in the office of the Commissioner of Insurance of this State, a statement of the condition of such company on the 31st day of December next preceding, exhibiting the following facts and items in the following form, namely:

1st. The amount of the capital stock of the company.

2d. The property or assets held by the company, specifying:

1. The value, or nearly as may be, of the real estate held by such company.

2. The amount of cash on hand and deposited in bank to the credit of the company, specifying in what banks the same are deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, constituting the first lien on real estate, on which there shall be less than one year's interest due or owing.

5. The amount of like loans, with one year's interest or more due thereon.

6. The amount due the company on which judgments have been obtained.

7. The amount of stocks and bonds of this State, of the United States, of any incorporated city of this State, and of any other stocks and bonds owned by the company, specifying the amount, number of shares, and par and market value of each.

8. The amount of stocks and bonds held as collateral security for loans, with the amount loaned on each with the par and market value thereof.

9. The amount of assessments on stock or premium notes paid and unpaid.

10. The amount of interest accrued and unpaid.

11. The amount of premium notes on hand on which policies are issued.

3d. The liabilities of such company, specifying:

1. The amount of losses due and yet unpaid, and the amount not due.

2. The amount of unpaid losses not due.

3. The amount of claims for losses resisted by the company.

4. The amount of losses incurred during the year, including those claimed and not yet due, and of those reported to the company upon which no action has been taken.

5. The amount of dividends declared due and unpaid.

6. The amount of dividends, either cash or scrip, declared but not due.

7. The amount of money borrowed and security given for the payment thereof.

8. The amount of premiums received on all risks not terminated.

9. The amount required to safely reinsure all fire risks in force, computed at fifty per centum of the gross amount of fire premiums (less return premiums and re-insurance) received on risks in force, not perpetual; ninety-five per centum of premiums on perpetual risks in force; and one hundred per centum of the amount of ocean marine premiums received on risks in force; *provided* that the premiums on unexpired fire risks shall be deemed to be, for the purposes of this act, not less than the gross amount of the fire premiums (less return premiums and re-insurance) received during the year preceding.

10. The amount of all other existing claims against the company.

4th. The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

5th. The expenditures during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which such losses are estimated in such preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions, salaries and fees to agents and officers of the company.

4. The amount paid in taxes.

5. The amount of all other payments and expenditures.

§ 8. It shall be the duty of the Commissioner of Insurance of

this State, to cause to be prepared and furnished to each of the fire and fire and marine insurance companies, incorporated by this State, and to the attorneys of companies incorporated by other States and foreign governments doing business in this State, printed forms of the statements required by this act, and the act to which this is in addition. Said Commissioner shall condense and arrange said statements in proper form for printing, and communicate the same to the General Assembly annually.

§ 9. The Commissioner of Insurance of this State is hereby authorized and empowered to address any inquiries to any fire or fire and marine insurance company, or to the Secretary thereof, doing business in this State, in relation to its financial condition, and it shall be the duty of any company so addressed to promptly reply in writing to any such inquiries.

§ 10. Every fire and fire and marine insurance company incorporated by this State, designedly failing to make and deposit the statement required by this Act, shall be subject to the penalty of five hundred dollars, and an additional penalty of five hundred dollars for every month that such company shall continue thereafter before making and depositing the same, to transact any business of insurance, to be recovered with costs of prosecution, in the name of the Treasurer of this State, for the use of this State, by action on this statute.

§ 11. It shall not be lawful for any fire or fire and marine insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of at least one hundred and fifty thousand dollars of cash capital paid up and securely invested; and any such company desiring to transact any such business as aforesaid, by an agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, and file in the office of the Commissioner of Insurance a certified copy of the vote or resolution of the directors appointing such attorney, which appointment shall continue until another attorney be substituted; and in case any such insurance company shall cease to transact business in this State, according to the laws thereof, the agent last designated, or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability, issued or contracted while such corporation transacted business in this State; and service of such process for the causes aforesaid upon any such agent shall be deemed a valid personal service upon such corporation; and shall also deposit with said Commissioner a certified copy of their charter, also a statement under the oath of the President or Vice President and Secretary of the company for which they may act, stating the name of the company and place where located; also all the other facts and items required by the seventh section of this act, to be stated by the

officers of fire and marine insurance companies chartered by this State; nor shall it be lawful for an agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire insurance in this State, without procuring from the Commissioner of Insurance a certificate of authority, stating that such company has complied with all the requisitions of this act and the act to which this in addition, which apply to such companies, and the name of the attorney appointed to act for the company; and in cases of regularly commissioned agents, a certified copy of such certificate of authority shall be published in a newspaper printed in the city of Hartford, and evidence of such publication shall be filed in the office of such Commissioner. The statements required by this section shall be renewed annually in the month of January, and in addition to the exhibit of the condition of such company on the 31st day of December next preceding, shall state the amount of premiums received and losses paid in this State during the preceding year, so long as such agency continues; and the said Commissioner on being satisfied that the capital, securities, and investments remain secure, shall furnish a renewal of his certificate as aforesaid. Any violation of the provisions of this section shall subject the party violating to a penalty of one hundred dollars for each violation, to be recovered in the name of the Treasurer of this State, by action on this statute, one-half of which shall be paid to the person informing, and the other half to the Treasurer for the use of the State. The term agent or agents used in this section shall include an acknowledged agent or surveyor, or any person or persons who shall in any manner aid in transacting the insurance business.

§ 12. Before any license shall be granted or renewed to any insurance company or association incorporated by or associated under any foreign government, such company or association shall, in addition to the requirements specified in the act to which this is in addition, file with the Commissioner of Insurance of this State, a copy of the last annual report or statement, if any, made under any law of the State or country by which such company or association was incorporated or associated, also a certified copy of their charter or deed of settlement.

§ 13. It shall be the duty of the Commissioner of Insurance of this State, whenever he shall deem it expedient to do so, either personally or by a committee to be appointed by him, and to consist of one or more persons not directors, officers or agents of any fire or marine insurance company doing business in this State, to examine into the affairs of any fire or fire and marine insurance company incorporated by this State, or doing business in this State; and it shall be the duty of the officers or agents of any such company to cause its books to be opened for the inspection of said Commissioner or said committee, and to otherwise facilitate such examination so far as it may be in their power to do; and for that

purpose the said Commissioner or committee shall have power to examine under oath the officers and agents of any such company in relation to its affairs and business ; and whenever the said Commissioner shall deem it for the interest of the public so to do, he shall publish the result of such investigation in one or more newspapers published in this State, always provided that in relation to the affairs of any company incorporated by or organized under the laws of any other State of the United States, it shall be optional with the said Commissioner to accept the certificate of the Insurance Commissioner or Superintendent of the State under the authority of which the said company was organized, as to its standing and condition, or proceed to investigate its affairs as herein before provided ; and whenever it shall appear to said Commissioner from such examination that the assets of any fire or marine insurance company incorporated by this State, after charging it with the sum requisite for re-insurance as fixed in section 7, and with its other proper liabilities, excepting capital, amount to less than three-fourths of its capital stock, if it have a stock capital, or in case of a mutual company, if the assets, less unsettled claims and other absolute liabilities, amount to less than three-fourths the sum requisite for re-insurance, computed according to the method fixed in section 7, then he shall call upon it to make up such deficiency within such reasonable time as he shall fix, and on a failure to comply with such requirement he shall bring his petition (setting forth the foregoing facts) to a judge of the Superior Court for the county in which the principal office of such company is located and praying for an injunction to issue restraining said company from the further prosecution of the business of making or renewing insurances until the said deficiency is made up, and if upon a hearing before said court the allegations contained in such petition of the said Commissioner shall be found true, the judge aforesaid shall issue such injunction.

§ 14. Whenever it shall appear to the Commissioner of Insurance from his own examination, or from the report of the committee appointed by him as provided in this act, that the affairs of any company not incorporated by this State, and doing business in this State, are in an unsound condition, estimated in the same manner as prescribed in the preceding section, he shall revoke the certificate granted in behalf of such company, and shall cause a notification thereof to be published in a newspaper printed in the cities of Hartford and New Haven, at least four weeks ; and the agent or agents of such company are, after the first publication of such notice, required to discontinue the issuing of any new policy, or the renewing of any previously issued, and any agent who shall make, issue or deliver any policy, or the renewal of any policy of insurance, or collect any premium of insurance, or in any way transact any business of insurance on behalf of any such company, shall be liable to a penalty of one hundred dollars for each offense, to be recovered with costs of prosecution, in the name of the Treasurer of this State by action on this statute, one-half of which penalty

shall be paid to the person informing, and the other half to the Treasurer for the use of the State. The term agent or agents used in this section shall include an acknowledged agent or surveyor, and any person or persons who shall in any manner aid in transacting the business of insurance of any insurance company or association not incorporated by this State.

§ 15. No foreign insurance company shall make any contract of insurance of any kind or description against loss or damage by fire or inland navigation risks, nor expose themselves to any such loss by any one risk or hazard for any greater amount in proportion to its capital as determined by the provisions of this act than companies organized under the laws of this State may do.

§ 16. The capital of such foreign company doing fire insurance business in this State, or any such company hereafter admitted to such business in this State, shall for all the purposes of this act, and of the general insurance laws of this State, be the aggregate value of such sums or securities as such company shall have on deposit in the insurance and other departments of this State, and of the other States of the United States, for the general benefit of policy holders in any of such States or in the United States, and all bonds and mortgages for money loaned on real estate in this State, or any State of the United States, provided such loans have been made in conformity with the laws of such State providing for the incorporation of insurance companies therein, and the investment of their capital, and all other assets and property in the United States, in which fire insurance companies organized under the laws of this State, may by the laws thereof invest, provided such bonds and mortgages, assets, and property, shall be vested in and held in the United States by trustees approved by the Commissioner of Insurance of this State, and citizens of the United States, for the general benefit and security of all its policy holders and creditors in the United States, after taking from such aggregate value the same deductions for losses, debts, and liabilities in this and the other States of the United States, and for premiums upon risks therein not expired, as is authorized or required by the laws of the State, or the regulations of its insurance department, with respect to fire insurance companies organized under the laws of this State.

§ 17. To determine the amount of such capital, the agent or attorney of such foreign insurance company doing fire insurance business in this State, shall within four months after the passage of this act, and in the month of January of every year thereafter, render to said Commissioner a detailed statement of the items making up said capital, and of the deductions to be made therefrom, subscribed and verified by the oath of such agent or attorney, and said Commissioner shall have authority to make such examinations in respect to such assets and liabilities as he shall deem proper, and upon compliance with the requirements of this act, it shall be his duty thereupon, and from year to year thereafter, to issue to such foreign insurance company a certificate of the amount

of its so determined capital, and that the requirements of this act have been complied with, upon which capital it may transact business in this State, subject to all the restrictions and limitations of the laws regulating fire insurance companies incorporated under the laws of this State.

§ 18. The trustees referred to in the sixteenth section of this act, shall be appointed directly by the board of managers or directors of such foreign insurance company, and a duly certified copy of the vote or resolution by which they were appointed shall, together with a certified copy of the trust, deed, or instrument under which they are to act, be filed in the office of the Commissioner of Insurance; and the said Commissioner shall have the same power to examine such trustees, or the agent or attorney, of such company under oath, and their assets, books and accounts, either in person or by one or more persons to be appointed by him, as by law he has as to the officers, agents, assets, books and accounts of any company authorized to do the fire insurance business in this State. And if by such examination it shall appear that the net capital for which the last certificate shall be outstanding has been materially reduced, the Commissioner may call in such certificate and issue another correspondent with such reduced capital.

§ 19. No foreign insurance company, or any agent or attorney thereof, shall be admitted to transact the business of fire insurance in this State, or take risks until, in addition to all other requirements of the laws now in force in this State, such companies shall comply with sections 15, 16 and 17 of this act, and receive the certificate of the Insurance Commissioner mentioned in the eleventh section of this act.

§ 20. The term foreign insurance company, as used in this act, includes any company, corporation, association, partnership, or individual of any foreign government doing fire insurance business in this State, whether incorporated or not.

§ 21. Any violation of the provisions of sections 15, 17, 18 and 19 of this act, shall subject the party so violating to a penalty of five hundred dollars for each violation, with costs of prosecution, to be recovered in the name of the Treasurer, by action on this statute, one-half of which shall be paid to the person informing, and the other half to the Treasurer for the use of the State.

§ 22. It shall be the duty of every company chartered by the legislature of this State, to grant insurances, or to make any contract contingent upon lives, on or before the first day of March in each year, to render to the Insurance Commissioner, upon the oath of its President and Secretary, a report of its condition upon the preceding 31st day of December, which shall include a detailed statement of its assets and liabilities on that day; the amount and character of business transacted; moneys received and expended during the year; a descriptive list of all policies and contracts of insurance in force on that day; and such other information as the Commissioner may deem necessary to determine the solvency

of such company. For this purpose the Commissioner shall prepare and furnish to each company suitable blanks with such questions as may be necessary. In case any company shall fail to make such report within the time aforesaid, it shall be deemed insolvent, and may be proceeded with as provided in section 28 of this act.

§ 23. Upon receipt of such report the Commissioner shall, without delay, make a valuation of the policies of each company, and ascertain the amount of re-insurance reserve proper to be held on account thereof. He shall for this purpose assume the rate of mortality shown by the so-called actuaries' or combined experience table, and four per cent. compound interest; and he shall value only net premiums.

§ 24. It shall be the duty of the Insurance Commissioner once in three years, and oftener if he deem it necessary, to visit each life insurance company incorporated in this State, and thoroughly examine its financial condition and its ability to fulfill its obligations, and ascertain whether it has complied with all the provisions of law applicable to the company and its transactions.

§ 25. He shall in like manner visit and examine as aforesaid, any life insurance company not organized or incorporated in this State, and doing business by agencies therein, whenever he has reason to doubt the solvency of such company. He may employ such assistants as may be necessary in making the examination; and all the expenses of an examination without the State, shall be borne by the company examined.

§ 26. For the purposes aforesaid, the Commissioner shall have free access to all books and papers of any life insurance company doing business in this State, and may examine under oath its officers or agents relative to its business and condition. If any company not organized or incorporated in this State, its officers or agents refuse to submit to such examination, or to comply with any provisions of this act in relation thereto, the authority of such company to do business in this State shall cease.

§ 27. No life insurance company hereafter organized or chartered in this State, shall issue policies until upon examination by the Commissioner it shall have been found to have complied with the laws thereof; nor until the Commissioner shall have issued his certificate setting forth such fact and authorizing such company to issue policies. For such examination the company shall pay to the Commissioner the sum of thirty dollars.

§ 28. If it shall appear from any report, valuation, or examination, as herein provided, that the assets of any company chartered by this State to grant insurances or make contracts contingent upon lives, are less than its liabilities, or if it shall fail to comply with any requirements of this act, the Commissioner shall forthwith notify such company to cease the issue of new policies, and the payment of dividends to stock and policy holders, until such time as the deficiency shall be supplied; and he may at his discretion bring his petition to the court of probate for the district in

which the principal office of such company is located, setting forth the facts upon which it is founded, and praying for an appointment of a trustee to take possession of the property of such company for the benefit of its creditors; such trustee, if appointed, shall proceed as directed by section 29 of this act.

§ 29. In case that it shall appear that the assets are less in amount than three-fourths of the liabilities of such company, the Commissioner shall without delay bring his petition to the court of probate for the district in which the principal office of such company is located, in the manner and form provided in section 28 of this act, and the court shall thereupon appoint a trustee who shall file with said court his oath of office, and a bond in such amount with such security as the court may direct, and who shall take possession of all books, papers, and property, and receive all moneys belonging to such company, and apply the same, under order of the court, to the settlement of all claims against it, and to the re-insurance of its risks in some company or companies of good standing, preference being given to companies chartered by this State; the trustee shall make a full report of his doings in the premises to the court appointing him, and the court shall upon the re-insurance of its risks, and the transfer of its property for that purpose, declare the dissolution of the company by an order to be published for one month in a paper of general circulation published in the county where the company is located.

§ 30. Any company organized or incorporated in another State, or by the government of the United States, or of any foreign country, to grant insurances or make contracts contingent upon lives, before being admitted to do business in this State and receiving the Commissioner's license therefor, and on or before the first day of March in each year, shall furnish to the Insurance Commissioner a certificate of the proper officer of the State or government by whose authority it is organized or incorporated, setting forth a true and full copy of its report to such officer, of its condition upon the thirty-first day of December last preceding, a valuation of its policies and contracts by said officer, by a standard equivalent to that provided in section 23 of this act, and that the company has complied with all the laws of the State or government by whose authority it is organized or incorporated and is authorized to transact business therein.

If such certificate shall substantially furnish the information required from companies chartered by this State, and it shall appear therefrom that the company furnishing the same is solvent, and if it shall have complied with all other provisions of law necessary thereto, the Commissioner shall thereupon issue his license to such company to transact business in this State for one year from the thirty-first day of December last preceding.

§ 31. In default of the certificate aforesaid, or if any other State or country shall refuse to license life insurance companies chartered by this State to transact business in such other State or

country upon a similar certificate from the Commissioner of this State, no license shall issue to any company organized or incorporated in such other State to transact business in this State, until it shall have made a report in the manner and form required from companies chartered by this State, and until a valuation of its policies and contracts shall have been made by the Commissioner as hereinbefore provided.

§ 32. If it shall at any time appear to the satisfaction of the Commissioner, from personal examination, or from any report or valuation, or certificate of the same, that any life insurance company organized or incorporated in another State, or under the authority of the government of the United States, or of any foreign country, does not possess assets equal in amount to its liabilities ascertained as hereinbefore provided, he shall forthwith revoke his license to said company and to its agents to transact business in this State, and shall cause notice thereof to be published for one month in two newspapers of general circulation printed one in the city of Hartford and one in the city of New Haven. License to such company to transact business may be re-issued when the Commissioner shall become satisfied of its restoration to solvency.

§ 33. Any officer, agent or other person, who shall issue or deliver in this State, any policy or contract of insurance of such life insurance company without license, or after revocation of its license, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than one hundred, nor more than five hundred dollars for each and every policy so issued or delivered.

§ 34. Life insurance companies of other States, and foreign companies, shall each appoint one agent or attorney residing in this State, who shall act in that capacity until a successor be duly appointed, upon whom any process from any court within the State may be served, and such service shall be binding and shall be deemed a personal service upon the company appointing the agent or attorney upon whom such service is made. A certificate of such appointment shall be filed with the Commissioner, and if such company shall withdraw from the State, or cease to do business therein, service upon such agent shall nevertheless be deemed a personal service upon the company appointing him.

§ 35. The Insurance Commissioner shall make each year to the legislature of this State a report of his official acts, and of the condition of all companies chartered by or doing business in the same, embracing the substance of the reports of such companies therein for the current year.

§ 36. A policy of insurance on the life of any person, expressed to be for the benefit of any married woman, or duly assigned, transferred, or made payable to any married woman, or to any person in trust for her benefit, whether the same be procured by herself, her husband, or any other person, shall inure to her separate use and benefit, or in case of her decease before payment of the same, to the use and benefit of her children, or of her husband's children, as

may be provided in said policy, independently of her husband, his creditors or representatives, or of the person procuring, assigning, or transferring the same, his creditors or representatives; *provided*, that if the annual premium on any such policy exceed three hundred dollars, an amount equal to the excess of such premium over three hundred dollars, with interest thereon, shall inure to the benefit of such creditors; and provided further, that in case of the decease of such married woman before the decease of the life insured, leaving no children of herself or of her husband, the policy shall become the property of the person who has paid the premiums upon the same, unless otherwise provided by said policy.

§ 37. Section 28, title 13, chapter 2, and section 383, title 7, chapter 7, of the Revised Statutes of 1866, and section 381 of chapter 7, title 7, of said Revised Statutes, and all other acts and parts of acts inconsistent with this act, are hereby repealed; and this act shall not affect any suit now pending.

§ 38. Nothing contained in this act shall be construed to alter or amend sections 384 and 385, title 7, chapter 7, of the Revised Statutes of 1866.

§ 39. This Act shall take effect from and after its passage.

Approved, July 27, 1871.

MICHIGAN.

AN ACT to establish an Insurance Bureau.

§ 1. *The people of the State of Michigan enact*, That there is hereby established in the State department a separate and distinct bureau, which shall be especially charged with the execution of the laws heretofore passed, or that may be hereafter passed, in relation to fire, fire and marine, life and other methods and practices of insurance.

§ 2. The chief officer of said department shall be denominated the Commissioner of Insurance. He shall be a citizen of this State, and shall reside, during the term of his office, at the seat of government, and personally superintend the duties of his office; and shall not be directly or indirectly connected with the management or affairs of any insurance company. He shall be appointed by the Governor, by and with the consent of the senate, and shall hold his office for the term of two years; he shall receive an annual salary of eighteen hundred dollars, to be paid quarterly, as is hereinafter provided: He may employ a clerk to discharge such duties as he shall assign him, whose compensation shall not exceed one thousand dollars per annum, which shall be paid to him monthly, on the certificate of the Commissioner of Insurance, and upon the

warrant of the Auditor General; whenever a vacancy shall occur in said office of Commissioner, by reason of death, removal, or otherwise, the Governor shall fill such vacancy by appointment, by and with the advice and consent of the senate, if in session. Within fifteen days from the time of notice of his appointment, the Commissioner shall take and subscribe the oath of office prescribed by the constitution, and file the same in the office of the Secretary of State; and the said Commissioner of Insurance shall give to the people of the State of Michigan a bond in the penalty of ten thousand dollars, with sureties, to be approved by the Auditor General, conditioned for the faithful discharge of the duties of his office.

§ 3. The Commissioner of Insurance shall possess all the powers, perform all the duties and be subjected to all the obligations and penalties now conferred by law upon the Secretary of State, or to which the Secretary of State is subject, in relation to insurance companies, and the formation thereof, under the laws relating thereto, so that every power and duty thereby conferred on the Secretary of State, shall, from and after the appointment of such Commissioner, be transferred to and conferred upon the said Commissioner. The Commissioner shall be required to annually report the name and compensation of the clerk employed by him, and the whole amount of expenses of the department during the year; such report shall be made on or before the last day of June in each year, and fifteen hundred copies shall be printed for public information and use.

§ 4. The said Commissioner, with the approval of the Governor, shall devise a seal with suitable inscriptions, for his office, a description of which, with certificate of the approval of the Governor, shall be filed in the office of the Secretary of State, with an impression thereof, which seal shall thereupon be and become the seal of office of the Commissioner of Insurance, and the same may be renewed whenever necessary. Every certificate, assignment or conveyance executed by the said Commissioner in pursuance of any authority conferred on him by law, and sealed with his said seal of office, shall be received as evidence, and may be recorded in the proper recording offices, in the same manner, and with the like effect as a deed regularly acknowledged or approved before an officer authorized by law to take the proof or acknowledgment of deeds, or filed in the office of any county clerk or clerk of a court of record, and all copies of papers in the office of the said Commissioner certified by him, and authenticated by the said seal, shall in all cases be evidence in all courts of this State equally and in like manner as the original; an impression of said seal directly on paper shall be as valid as if made on a wafer or wax.

§ 5. All books, papers and documents, and all other papers whatever in the office of the Secretary of State, relating to the business of insurance, shall be transferred to the custody of the Commissioner of the Insurance Bureau, and be and remain in his charge and custody.

§ 6. There shall be assigned to the said Commissioner by the Secretary of State, at Lansing, suitable room in his department for conducting the business of said bureau, and the said Commissioner shall, from time to time, furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the said business, the expenses of which shall be paid, on the certificate of the Commissioner and the warrant of the Auditor General, by the State Treasurer from the fund hereinafter mentioned.

§ 7. The taxes on premiums from insurance companies shall continue to be paid to the State Treasurer, on the first day of January, or within sixty days thereafter in each year, and shall be upon the premiums which, during the year or part of the year ending on the preceding thirty-first day of December, shall have been received by any insurance company, or by any person acting as agent therefor, both upon policies issued by agents in this State, or policies issued at the office of the companies upon application of sub-agents or others, or for any individuals or association of individuals, not incorporated or authorized by the laws of this State, to effect insurance against fire, inland, marine, life, casualty, or other losses and risks, or which shall have been received by any person for such company or agent, or shall have been agreed to be paid for any insurance effected, or agreed to be effected, or procured by such company or agent, or against fire, inland, marine, life, casualty, or other risks, although such companies, associations, or individuals may be incorporated or authorized for that purpose by the laws of any other State of the United States, or of any foreign government. The State Treasurer on receiving such tax from any company shall issue therefor duplicate receipts; one of which he shall deliver to the company, and the other shall be filed with said Commissioner.

§ 8. It shall be proper and lawful for the Commissioner of Insurance to visit any insurance company in other States for the examination of its affairs, the expenses in all cases to be paid by said insurance companies.

§ 9. The State Treasurer shall keep all funds received from said taxes as a separate and distinct fund for the maintenance of said bureau, and all warrants for the salary of the Commissioner and his clerk, and for all other expenses of such bureau, shall be drawn by the Auditor General upon, and paid out of such fund; and in case of any balance to the credit of said fund, in excess of the necessary expenses of such bureau, it shall be transferred at the close of the fiscal year to the general fund of the State.

§ 10. The Governor shall have the power, and it is hereby made his duty, to remove the said Commissioner for neglect of duty, breach of trust, incompetence or malfeasance in office, upon reasonable cause shown, and in case of such removal the Governor shall file in the office of the Secretary of State, and report to the legislature at its next session, the reasons for such removal.

§ 11. This act shall take immediate effect.

MISCELLANEOUS.

THE JOURNAL, for the next two or three numbers, will contain no leading articles, the space being devoted to the Digest and Report of a number of important cases now on hand, and to the Acts of the State Legislatures relating to Insurance.

CASES REPORTED.

We give in this number a full report of six insurance cases.

In *Miller vs. The Mutual Benefit Life Ins. Co.*, the court decide that the agent of a company has power to waive the written conditions and requirements of the application and policy, and that the company is responsible for the misrepresentations of an agent, who has been informed of the facts, in filling out these papers, and the same doctrine is maintained in *Miner vs. The Poenix Ins. Co.* The decision in another case, *North American Fire Ins. Co. vs. Throop, Mich. S. C.*, decided during the present year, and which we shall give in our next number, is to the same effect. These cases seem to overrule the doctrine heretofore held upon this subject.

In *Northrup vs. The Railway Assurance Co.*, the court decide that a passenger walking from a steamboat landing to a railway station, in the prosecution of a journey, is, in the meaning of the law, traveling by a public conveyance.

In the case of *The Springfield Ins. Co. vs. Brown*, the court construe the word "property," in a clause forbidding alienation, to mean the thing insured, and not the interest held as mortgagor.

Bradley, Admr. vs. The Mutual Benefit Life Ins. Co., is a case of peculiar interest. Another case, upon a similar policy, on the life of the same person, and involving the same questions, was four times before the Supreme Court of Massachusetts, 13 Allen, 308 and 99 Mass., 317. The question is, whether the proviso that, if the assured shall die "in the known violation of any law of these States," the policy shall be void, applies to a violation of the law relating to the civil rights of parties. In Massachusetts it was held that the proviso did not refer to a violation of such law, and the case was decided against the company. In the present case, the decision is the reverse, and in favor of the company, but with a dissenting opinion, which we publish.

INSURANCE LEGISLATION.

Connecticut.—The insurance law passed at the late session of the Connecticut legislature, and which will be found in the present number of the JOURNAL, provides for the appointment of an Insurance Commissioner, whose term of office shall be three years, and his salary \$3,500 per annum, and expenses while attending to his duties outside of Hartford, with incidental expenses of his office and necessary clerical aid. He is required to report annually to the legislature. The fees to be paid the department are reasonable. For valuing life policies, the fee is one cent per one thousand dollars of insurance valued.

Each fire and marine insurance company is required to file an annual statement of its condition, and the Commissioner is authorized to address any inquiries to the company in relation to its financial condition, which the company is required to reply to in writing. It is also the duty of the Commissioner, whenever he shall deem it expedient, to examine into the affairs of any such company incorporated or doing business in the State, and if its stock or assets are found to be impaired beyond a certain amount, he may compel it to make up the deficiency, or may petition a judge of the Superior Court for an injunction to restrain it from doing business. Whenever it shall appear to him that the affairs of any company, not incorporated in that State, are in an unsound condition, he shall revoke its certificate and make publication of the facts.

No fire insurance company incorporated in the State, or elsewhere, is permitted to expose itself to any loss on any one fire risk to an amount exceeding ten per cent. of its paid up capital.

No fire or fire and marine insurance company from another State shall do business in the State "unless possessed of at least \$150,000 of cash capital paid up and securely invested." Such companies are requested to file a copy of their charters and a statement, to be renewed annually, of the facts required in the annual reports of companies incorporated in the State. The capital of any foreign fire company shall be considered to be the aggregate value of such sums or securities as the company shall have on deposit with the department of that, or other States of the United States, held by trustees, citizens of the United States, for the benefit of policy holders in the United States; and such company is required to make detailed statements to the Commissioner in regard to such capital.

Each life insurance company, organized in the State, is required to make an annual report, to include certain specified statements and "such other information as the Commissioner may deem necessary to determine the solvency of such company." In case the company shall fail to make such report within the required time, it is to be proceeded against as if insolvent. The Commissioner is required annually to make a valuation of the policies of each home company, and to ascertain the amount of re-insurance reserve,

necessary on account thereof; and once in three years, and oftener if he shall deem it necessary, he is to visit each company incorporated in the State, and thoroughly examine its financial condition, and is in like manner to examine other companies doing business in the State, whenever he has reason to doubt their solvency. If the assets of any company, incorporated in the State, shall be less than its liabilities, he may notify it to cease issuing policies and paying dividends on stock, until the deficiency is made up; or he may proceed to wind up the company. In case, however, the assets are less than three-fourths the liabilities of the company, he is required to proceed against it for its dissolution and the winding up of its affairs without delay. Each insurance company, not incorporated in the State, is required, before commencing business, to furnish a certificate, to be renewed each year, containing a copy of the annual report of the insurance officer of its own State in regard to its condition, a valuation of its policies, and a statement that it has complied with all the laws of the government by whose authority it was incorporated. In default of such certificate, or if the State or country in which it was incorporated shall refuse a license upon a similar certificate from the State of Connecticut, the company is required to make a report in the manner and form as required from companies incorporated in that State, and to submit to a valuation of its policies and contracts by the Commissioner. If at any time it shall appear to the Commissioner that any such company does not possess assets equal to its liabilities, he shall forthwith revoke his license to the company and make publication of the fact.

Life policies, for the benefit of married women, the premium on which does not exceed \$300 per annum, are exempt from the claims of the creditors of the person insured.

Every insurance company, not incorporated in the State, is required to appoint one agent in the State upon whom process of law may be served.

The bill seems, in the main, to have been well drawn, but has not entirely escaped the effects incidental to a passage through a legislature.

Michigan.—The act of the Michigan legislature establishing an Insurance Bureau, provides for the appointment of a Commissioner, to hold his office for the term of two years, with a salary of \$1,800 per annum and the expenses of office, stationery, &c. He is allowed a clerk, whose salary is not to exceed \$1,000 per annum. The Commissioner is to have all the powers and discharge all the duties now conferred upon the Secretary of State in relation to insurance companies. He also has authority to make an examination of the affairs of insurance companies incorporated in other States and doing business in Michigan. We publish the act in the present number of the JOURNAL. Sam'l H. Row has been appointed Commissioner under the provisions of this act. His office is at Lansing.

REPORT OF THE MISSOURI INSURANCE DEPARTMENT.—The report of Superintendent King, of the Insurance Department of Missouri, occupies about three hundred pages. The second part, relating to life companies, is in the hands of the printer, and will soon appear. Mr. King reports the business of insurance in Missouri as prosperous, and the condition of the companies as generally satisfactory. 115 companies are now doing business in the State, 43 of which are home companies, and 72 are incorporated elsewhere. One company, The Kansas City Fire and Marine, has been prohibited from doing business, and is now in the hands of the court. Full abstracts are given of the statement of all companies doing business in the State.

REPORT OF THE NEW YORK INSURANCE DEPARTMENT.—*The New York Times* of August 24th, says:

“We have received advance sheets of the report of the Superintendent of the Insurance Department upon life and casualty insurance business in the State of New York. As yet, the text of the the fire report has not made its appearance, and unless it is fuller and more specific than the life report, now in hand, there is no great necessity for its appearing at all.

The twenty-four pages which form the text of Mr. MILLER's life report, are rather remarkable for what they omit than for what they contain. Following them, indeed, are several tables containing the condensed figures of the companies' annual statements, but in the preliminary text, one looks in vain for anything like an analysis of the present condition of the companies, or for any other practical views upon the great problem of life insurance. The larger part of the report is taken up with quotations from the Superintendent's report of last year, and with the documentary history of the Great Western and Farmers' and Mechanics' failures, all of which were published in the papers months ago, and could hardly be deemed worth reproducing here. The omission of all memoranda respecting the numerous examinations made by Mr. MILLER during the year, of life companies whose condition suggested inquiry, is particularly to be regretted. The public are entitled to know all about these examinations and their results, and we submit that it would prove as important information as that which tells the story of the two companies which actually failed under an investigation. For instance, why are we not placed in possession of the results of Mr. MILLER's examination of the Anchor, Craftsmen's, Hope, Knickerbocker, Merchants', Metropolitan, National, New Jersey, and other companies? Not only is no information given on the subject, but no definite reference whatever is made to the fact that these companies were examined at all.

The Superintendent charges that the ‘officers of *some* companies are not sufficiently careful to be strictly correct in their statements.’ This is a pretty grave accusation, considering the fact that it in-

volves a charge of perjury, and, not being specific, lies at the door of every one of the officers. Again, we are told that 'there have been some instances of dishonest diversion of companies' funds.' This, too, is one of those vague charges whose very vagueness is calculated to alarm. Why not give the names of the guilty ones in these cases, instead of thus slinging a slanderous insinuation into the very midst of the circle? It will hardly answer to say that 'public policy does not seem to demand' the publication of the facts, for the retort is a natural one. Why excite public suspicion and distrust by vague charges?"

THE *Western Insurance Review* seems to have been a little mixed in its Legal Department, for June: two or three columns of the decision in *Miller vs. The Mutual Benefit*, having "got lost" in the report of *Miner vs. The Phoenix Ins. Co.*

THE *Spectator*, of New York, announces a new work on Life Insurance, by Nathan Willey, Actuary, to be issued from the *Spectator* press in September.

THE Legislature of Connecticut adjourned on July 28th. The most important measures adopted were the passage of a general railroad law—a new militia law—a new insurance law, which is contained in the present number of the JOURNAL—the re-establishment of the State Board of Agriculture—the consolidation of the New York and New Haven, and the Hartford and New Haven railroads, and an appropriation of \$500,000 for a new State House at Hartford. Charters were also granted to one life, and two fire insurance companies.

A CHANGE of administration is now taking place in the Amicable Mutual Life Insurance Company, of New York. The management of the company has not been satisfactory to a majority of the stockholders, and the president, E. Dwight Kendall, has resigned. The affairs of the company are undergoing a thorough investigation by Mr. D. P. Fackler, consulting actuary.

Two more English life insurance companies have recently succumbed—The Home Life and the English President.

THE Connecticut Legislature, at its last session, chartered one life insurance company—The Putnam. The principal office of the company will be at Putnam, Conn.

THE St. Louis Circuit Court, at general term, recently decided, in the Benton case, that parties to a suit for divorce cannot be permitted to testify. The practice has heretofore been otherwise.

Gov. JEWELL, of Connecticut, has given three prizes of fifty dollars each, to the Yale Law School, for the three students who pass the best examination next year.

AN Indiana judge has been nicknamed "Old Necessity," because necessity knows no law.

THE
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OCTOBER, 1871.

No. 2.

DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

AGENTS.

§ 37. FIRE—*Authority of.—Representation.*—There were two mortgages on property, originally for \$2,500 and \$500, which at the time of insuring had been reduced to about \$2,200 and \$250—and the party in his application for insurance upon this property, in reply to the question, “Is there any incumbrance on the property?” answered “No;” and in reply to the question, “If mortgaged, state the amount and to whom,” answered, “Two thousand dollars, Topliff & Day,” and at the same time signed the usual covenant and agreement that the foregoing was a just, true and full exposition of all the facts, &c., having fully informed the agent of the company, who wrote the application and his answers, of all the facts in regard to the

incumbrances,—*Held*, that in a suit to recover on a policy issued upon the application, evidence was admissible to prove that the agent of the company was fully informed in regard to the incumbrances. “We think evidence of these facts was competent. Its purpose was not to vary or contradict the contract of the parties, but to preclude the party who had framed it, from relying upon incorrect recitals to defeat it, when he himself had drafted those recitals and was morally responsible for their truthfulness.”

Plum vs. Cattaraugus Mut. Ins. Co., 18 N. Y., 394; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550, (over-ruling earlier New York cases); *Anson vs. Wumesheik Ins. Co.*, 23 Iowa, 84; *Malleable Iron Works vs. Phoenix Ins. Co.*, 25 Conn., 465; *New England M. & F. Ins. Co. vs. Schettler*, 38 Ill., 116; *Hough vs. City Fire Ins. Co.*, 30 Conn., 10; *Pattan vs. Farmers' Fire Ins. Co.*, 40 N. H., 383; *Columbia Ins. Co. vs. Cooper*, 50 Penn. St., 331; *Ohmsted vs. Etna Live Stock, &c. Ins. Co.*, 20 Mich.

“And we think the estoppel is precisely the same when the agent of the insurer drafts the papers as it would be in the case of an individual insurer, who was himself personally present and acting.”

Rowley vs. Empire Ins. Co., 36 N. Y., 550; *Anson vs. Wumesheik Ins. Co.*, 23 Iowa, 84; *Marshall vs. Columbian Fire Ins. Co.*, 27 N. H., 165; *Peoria M. & F. Ins. Co. vs. Hall*, 12 Mich. 214; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 31 Conn., 517.

The North American Fire Ins. Co. vs. Throop.*

Rep'd Jour'l, p. 98.

MICH. S. C.

CHARTER.

§ 38. FIRE—*Restrictions in—Other Insurance*.—The charter of the company provided that “if there shall be any other insurance upon the whole or any part of the property insured by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said Company, indorsed upon the policy, under the hand of the Secretary.” “There was such double insurance in this case, at the time this

*Decision rendered January 4th. To appear in 41 Iowa.

policy was issued, and the consent of the company there-to was not indorsed upon the policy." *Held*, that "the legislature inserted the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than as provided therein;" and that the provisions of this section "could not be waived by the defendants, or departed from in any essential particular."

Head vs. Providence Ins. Co., 2 Cranch, 127; *Phillips on Ins.*, Vol. 1, p. 9; *New London vs. Brainard*, 22 Conn., 552; *Occum Co. vs. Sprague Mfg. Co.*, 34 Conn., 529; *Hood vs. New York and New Haven R. R. Co.*, 22 Conn., 502.

And that "it was not competent for the plaintiffs to prove the consent of the defendants to the double insurance on the plaintiff's property by any other evidence than an endorsement of such consent on the policy, under the hand of the secretary of the company."

*Couch and Wife vs. The City Fire Ins. Co.**

Rep'd Jour'l, p. 28 127

CONN. S. C. E.

CONSTRUCTION.

§ 39. FIRE—*Literal Compliance*.—Compliance with the terms of the policy is necessary, but "a *literal* compliance is not necessary, where a *substantial* compliance has been shown." "It is certainly true, that all that can be required, in such a case, is (as in any other contract,) a reasonable and substantial compliance with the conditions of the policy."

Ang. on Ins., § 229; *Turner vs. N. American Ins. Co.*, 25 Wend. 374; 2d *Phillips on Ins.*, § 1865; 2d *Kern*. 81.

Home Ins. Co. of New Haven vs. Cohen.†

VA. S. C.

EVIDENCE.

§ 40. FIRE—*Construction*.—The policy stated the insurance to be "on lumber and stock of felloes, poles, bows and shafts, manufactured and in process of manu-

*Decision rendered September 30th. To appear in 37 Conn.

†Decision rendered March—. To appear in 20 Grattan.

facture, contained in the above named building." It was claimed that the words "contained in the above named building" applied only to goods in process of manufacture and, that the policy covered manufactured goods and stock outside the building,—*Held*, that the contract "covers only the lumber and stock in the building; and its terms are too plain to admit of parol evidence upon any theory that they need or will admit of explanation giving them a broader scope and meaning."

The North American Fire Ins. Co. vs. Throop.

—§ 37.

§ 41. FIRE—The plaintiff, as witness, having denied his signature to an application, in his cross examination was shown another paper, so folded as to show only the signature, and asked if that was his signature,—*Held* that he had a right to look over the whole paper before answering.

The North American Fire Ins. Co. vs. Throop.

—§ 37.

OCCUPATION.

§ 42. ACCIDENT—*Change of*.—The policy provided that the assured should give notice of any change in his occupation or business. While on a visit to his grandfather, he assisted in hauling in and unloading hay, and while so engaged received an accidental injury from which he died. *Held*, that there was no change in his occupation or business within the meaning of the policy, and that such a construction would be unreasonable and absurd, and would prevent the assured from performing any act or service outside of his usual avocation or business without rendering the policy null and void.

*North American Ins. Co. vs. Burrows.**

PA. S. C.

OFFICERS.

§ 43. FIRE—*Power of—Admissions of—Parol Contracts*.—Two policies were issued, one on the building, and

* Decision rendered October 9th. To appear in 66 Penn. St. R.

the other on the museum collection. The policies each contained the following conditions: "The interest of the insured in this policy is not assignable, unless by consent of this corporation manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from henceforth be void and of no effect." "The interest of the insured in this policy is not assignable unless the assignee, before any loss happens shall give notice in writing of the assignment to this company, in order to have the same indorsed on, or annexed to this policy." The property was afterwards bought under a deed of trust by the plaintiffs. The policies were sent to the office of the company with written notice of the change of title and returned with the written entry on the face of each, "Loss, if any, payable to R. F. Lamb, A. K. Northrop and A. Boeckler." Shortly afterwards the museum collection was sold, and the policy was again sent to the office of the company with a request that it might be changed to cover furniture. The president of the company made this additional entry on its face;

"This policy is hereby changed to cover chairs, benches and furnaces, instead of museum collection, which is removed. W. H. Jennings, Pres't." After the loss, the president told the plaintiffs, that this entry was all right, and if other companies paid he would.—*Held*, that "in absence of any explicit prohibitions from making parol contracts contained in the charter and by-laws, corporations, like natural persons, may make parol contracts; indeed, by the whole course of decisions in this country, corporations in their contracts are placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions;" and *Held*, that "a corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them, and concerning a matter upon which they are called to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.

Cornish, as secretary *pro tem.* had the unquestioned authority, as was his habit, to make indorsements on policies. Whether he made them in exact or precise accordance with the rules of the company was not for the insured to inquire." "Cornish, the clerk and acting secretary, was in charge of the office and acting for the company, and when the policies were returned with the entries written thereon, 'Loss, if any, payable to Lamb, Northrop and Boeckler,' the parties had a right to presume that it was done by rightful authority. Jennings, the president, who, it appears, had full power to act, admitted that the contract was a valid one before the loss, by making a further and additional entry on one of the policies, and after the loss, by telling both Lamb and Northrop that the entry was all right, and if the other companies paid he would. In this case it is very clear to my mind on the state of the pleadings that the agents were acting within the scope of their general authority, and the company is responsible for their acts in the premises."

Horwitz vs. The Equitable Ins. Co., 40 Mo., 557; Combs vs. Home Savings and Insurance Co., 43 Mo., 148; Rowley vs. Empire Ins. Co., 36 N. Y., 550.

Angel and Ames on Corps., § 240; Henning, *et al.* vs The United States Ins. Co., 47 Mo., 425; Conover vs. Mut. Ins. Co., 1 Comst., 290. Salmes vs. Rutgers Fire Ins. Co., 3 Keys, 416; Commercial Ins. Co. vs. Cropper, 21 Ind., 311.

*Northrup, et al. vs. The Mississippi Valley Ins. Co.**

Mo. S. C.

POLICY.

§ 44. LIFE.—*Term of.*—*Held*, that a policy issued in consideration of a sum in hand paid, and a like sum to be paid annually during the life of the assured, is "one entire contract; not from year to year, as the premiums shall be paid, but for the whole term of the life" of the assured.

*Decision Rendered April 31. To appear in 47 Mo.

Ruse vs. Mutual Life Ins. Co., 26 Barb., 556; *Housden Adams vs. Guardian Life Ins. Co.*, 1 Bigelow, 218. 97 Mass., 144.

The Manhattan Life Ins. Co. vs. Warwick.*

Rep'd Jour'l, p. 115.

V. A. S. C.

§ 45. *LIFE—Indorsements—Premiums—Waiver of Receipt.*—This notice was indorsed upon the policy, to which no reference was made upon its face: "No payment of premium binding on the company unless the same is acknowledged by a printed receipt signed by an officer of the company. *Held*, that if this indorsement upon the policy is inconsistent with its terms and legal effect, or repugnant thereto, it is void.

Pullerton vs. Agnew, 1 Salkeld, 172.

Held, also, that "according to the true intent and meaning of the contract, the premiums were to be paid by the assured to the agent of the company in Richmond, Virginia, and not to the officer or agent of the company in New York;" and *Held*, also, that "if on the day and place when and where payment was to be made the assured offered to pay the agent, who had not been provided with the printed receipts, the company will be presumed to have waived that requisition, and a payment to the agent without them would be good, and a sufficient compliance with the contract."

The Manhattan Life Ins. Co. vs. Warwick.

—§ 44.

PRACTICE.

§ 46. *MARINE—Certificate of Division in Opinion.*—A division in opinion occurred in the United States Circuit Court while the Associate Justice of the U. S. Supreme Court and the Circuit Judge were sitting together as the Court, and the case came before the Supreme Court on a certificate of division in opinion. *Held*, that a difference of opinion between these Judges sitting in the Circuit Court may be certified to this Court under the act of April 29th, 1802, (2 Stat. at Large, 159,) and

* Decision Rendered April 18th. To appear in 20 Grattan.

that the case is properly brought before the Court by certificate.

*New England Mutual Marine Ins. Co. vs. Dunham.**

Rep'd Jour'l, p. 138.

UNITED STATES S. C.

§ 47. MARINE—*Maritime Contract*.—A libel *in personam* was filed in the District Court for the District of Massachusetts on a policy of insurance, dated at Boston, whereby the insurance company, a corporation of Massachusetts, agreed to insure the libellant, a citizen of New York, in the sum of \$10,000, for whom it might concern, on a vessel called the Albina, for one year, against the perils of the seas and other perils in the policy mentioned. The libellant alleged that within the year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the other vessel, and sustained much damage; and that he had expended large sums of money in repairing the same, of which he claimed payment of the insurance company. *Held*, that "the admiralty and maritime jurisdictions of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analagous jurisdictions in other countries constituting the maritime commercial world, as well as that of England;" that whether a contract is to be considered as maritime or not maritime, depends, not on the place where it is made, but on the *subject matter* of the contract; that a contract of marine insurance is a maritime contract, and "that the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain the libel in this case."

New England Mutual Marine Ins. Co. vs. Dunham.

—§ 46.

§ 48. FIRE—*Statute—Pleading*.—*Held*, that under the following section of the statutes:

§ 12 "The answer of the defendant shall contain: First, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information

* Decision rendered March 27th.

thereof sufficient to form a belief. Second, a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language without repetition." (2 Wagner's St., p. 1015.)

"Where new matter is relied upon in defense or in evidence, it must be set out in the answer. Therefore, the grounds taken in reference to a stamp, and the keeping of a bar in the premises, are not open as a defense to the defendants, inasmuch as they were not set forth in their answer. Under the old system by pleading the general issue, everything was open to proof, which went to show a solid defense. But the practice act, which has substituted for the general issue an answer, and requires a statement of any new matter constituting a defense, in addition to a special denial of the material allegations of the petition intended to be controverted, has worked a complete and total change in the principles of pleading. The defendants by merely answering the allegations in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case."

Northrup, et al. vs. The Mississippi Valley Ins. Co.

—§ 43.

§ 49. FIRE—*Statute—Jurisdiction*—The defendants, a corporation organized in another State and doing business in Pennsylvania, under the provisions of the act of April 11th, 1868, by which they were required to "appoint an agent or attorney resident in this State, on whom process of law can be served," filed a petition for an order of removal from the State Court to the United States Circuit Court. *Held*, that no agreement is to be implied by the acceptance of a license on such a condition; that the defendants are to be sued only in the State Courts. The suit may be tried in any Court which, independently of this act, has jurisdiction. "If the Constitution of the United States and the acts of Congress have conferred upon the Federal Courts jurisdiction, there is nothing in the acceptance by them of a license granted to them by the act of Assembly, which can or ought to oust it." The Circuit Court of the United States is a Court of this State.

The Commonwealth *vs.* Pittsburg and Connellsville R. R. Co.,
8 P. F. Smith, 26.

*Newhall vs. The Atlantic Fire and Marine Ins. Co.**

PA. S. C.

PRELIMINARY PROOF.

§ 50. ACCIDENT.—The policy provided that no payment shall be due and no claim be made under it on account of the accidental loss of life of the assured, unless notice of the injury, and of the death, shall be given to the company, and sufficient proof furnished said company of such injury, and that such death was caused solely by such accidental injury. The jury found on sufficient evidence that while the assured was pitching hay the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died, and that the blow which he received from the fork handle was an accident and the cause of his death. Notice was given the company that the assured came to his death by accident on the 14th of July, by an injury received in the bowels while working in the hay field, producing peritoneal inflammation, which resulted fatally. The affidavit of the plaintiff, subsequently furnished, avers “that her late husband died in consequence of an accident, which happened on the 9th day of July, 1867, in this wise: Said deceased on the day aforesaid was assisting in unloading hay in Hope-well township, New Jersey, at his grandfather’s, where he had gone on a visit, when he accidentally strained himself. He immediately complained of severe pain, and a physician was summoned. All was done for his relief and recovery that could be, without success. He lingered till the 14th of said month, when he died, and the said accident was the direct cause of his death;” and the attending physician in his affidavit says he “knows that he was killed by accident on the 14th day

* Decision rendered September 23d. To appear in 66 Penn. St. R.

of July last, and further, that the accident was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles and produced peritoneal inflammation and all its concomitant symptoms, which resulted in his death on the 14th of July last." *Held*, that the facts as stated in the affidavits make out a *prima facie* case of death resulting from an injury, accidentally received; that the preliminary proof furnished by the plaintiff must be regarded as sufficient, and that "the plaintiff is entitled to recover if she has given sufficient preliminary proof of the injury, though she may have unwittingly ascribed it to a wrong cause."

North American Ins. Co. vs. Burrows.

—§ 42.

REPRESENTATION.

§ 51. FIRE—*Practice*.—Where a person procuring a policy of insurance upon a building, that has recently taken fire under suspicious circumstances, was asked in his application, whether he had any reason to believe his property was in danger from incendiaries, answered "No," and failed to disclose the fact of the fire,—*Held*, that the disclosure of the fact of the fire and of his reasons to fear danger from incendiaries was material to the risk; that it was not competent to submit to a jury the question of materiality, and that it was no defense, that information was given sufficient to put the agent of the company upon inquiry.

The North American Fire Ins. Co. vs. Throop.

—§ 37.

SUICIDE.

§ 52. LIFE—*Insanity*.—The policy contained a condition avoiding liability thereon in case the assured shall "die by his own hand." The assured died from poison self-administered. *Held*, that "there is no presumption of law, *prima facie*, or otherwise, that self-destruction arises from insanity;" and that "if he was impelled to

the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable."

*Terry vs. Mutual Life Insurance Co.**

Rep'd Jour'l, p. 132.

U. S. CIRCUIT COURT, DISTRICT OF KAN-AS.

TAXATION.

§ 53. FIRE—*Retrospective Laws*.—The act approved December 31st, 1868, provides that taxes shall be assessed on the gross amount of premiums received by any insurance company organized under the laws of the State, and on the capital stock of all incorporated companies created under any law of the State; and that all property shall be assessed to the person or corporation owning or having the same in possession on the first day of January of the year for which the assessment is made. *Held*, that "the legislature may pass laws which may comprehend past transactions, when such laws do not impair vested rights or the obligation of contracts. There must be a constitutional provision invaded before the legislative power can become paralyzed, and this invasion must distinctly appear."

Fletcher vs. Peck, 6 Cranch, 57; *Hoffman vs. Hoffman, et al*, 26 Ala., 535; *Weaver's Ex. vs. Weaver's Creditors*, 23 Ala., 789; *Carpenter vs. Pennsylvania*, 17 How. 456; *Durman vs. The State*, 34 Ala., 215; 232.

And that "the revenue law took effect on the day of its passage, and subjected all taxable property in this State to its burdens on the first day of January, 1869."

Branch Bank of Mobile vs. Murphy, 8 Ala., 410.

The Citizens Ins. Co. vs. Tutt, Collector.†

ALA. S. C.

§ 54. LIFE—*Statutes—Collector*.—The defendant was tax collector of St. Louis county, and the action was

* Decision rendered May 26th. To appear in Dillon's U. S. Circuit Court Reports.

† Decision rendered February 13th. To appear in 45 Ala.

brought against him to recover back the amount of taxes collected of the plaintiff upon money loaned and on hand belonging to the company. The tax was levied on an assessment under the act of February, 1864, which provides that a tax shall be levied on "shares of stock in banks and other incorporated companies," and on "all property owned by incorporated companies over and above their capital stock." *Held*, that the property was subject to taxation, and that "it was the collector's duty to collect the tax unless the assessment was void, and it could not be said to be utterly void if the property was subject to taxation." "The collector need only inquire whether the assessor had jurisdiction over the property, *i. e.*, whether it was liable to taxation in any form; and he need not trouble himself about the regularity of his proceeding. If the tax list shows jurisdiction, he is protected."

H. & St. Joe. R. R. vs. Shacklett, 30 Mo., 550; *State vs. Shacklett*, 37 Mo., 280; *Glasgow vs. Rowse*, 43 Mo., 479.

St. Louis Mutual Life Ins. Co. vs. Charles.*

Mo. S. C.

WAIVER.

§ 55. FIRE—*Production of Bills and Invoices, &c.*—The policy provided that all persons insured by the company, in case of loss or damage by fire "*if required*," shall produce their books of account and other proper vouchers, and shall also produce certified copies of all bills and invoices, the original of which have been lost, and exhibit the same for examination *by any person named by the company*, and be examined on oath touching all questions relating to the claim; and until such proofs are furnished the loss shall not be deemed payable;" and the insured after having furnished preliminary proofs, informed the company that all his books and papers had been destroyed, and demanded what additional proof, in their absence, was required, and the company failed to indicate the character of the evidence it required, and also neglected to name a person to whom the books and papers were to be exhibited, and insisted

*Decision rendered March 27th. To appear in 47 Mo.

on copies of the bills of goods purchased,—*Held*, that “where the company puts its refusal to pay upon the ground of a defect in the preliminary proofs, they ought to point out what the defect is; what is necessary to be supplied, so as to give the insurer an opportunity to supply what is required. Failure to do this, or their silence, when called upon, will be held to be a waiver of such defect in the preliminary proofs.”

Angel on Ins., § 245; *Etna Fire Ins. Co. vs. Tyler*, 16 Wend., 385; *Burnstead vs. The Dividend Mut. Ins. Co.*, 2 Kern., 81; *Turner vs. N. American Fire Ins. Co.*, 25 Wend., 374 and 379.

And so, “where the company has the right by the express terms of the policy to call for the production of copies of bills, invoices, &c., where the originals have been lost, *before a person to be named by them*, and they fail to name such person, the company will be held to have waived their right to require their production, as a part of their preliminary proof.”

The Home Ins. Co., of New Haven, vs. Cohen.

—§ 39.

WAR.

§ 56. *LIFE—Effect of, on Contract.*—A resident of Virginia took a policy, before the war, from the agent, in that State, of a company incorporated in the State of New York, and paid him the premium. This agent was to continue his residence in Virginia, and to him the premiums were to be paid. *Held*, that the breaking out of the war did not annul the contract between the parties, or exonerate the company from its obligations under it.

The Manhattan Life Ins. Co. vs. Warwick.

—§ 44

§ 57. *LIFE—Agency—Revocation of.*—A company incorporated in the State of New York appointed, before the war, a resident of the State of Virginia as its agent for that State. *Held*, that the war was not a revocation of the agency.

The Manhattan Life Ins. Co. vs. Warwick.

—§ 44.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

COURT OF APPEALS OF NEW YORK.

ELIZABETH E. BAKER, *Resp't*,

vs.

THE UNION MUTUAL LIFE INS. CO., *App't*.*

The husband has an insurable interest in his own life, and can insure for his own benefit. He may also insure in favor of any one having an interest in his life, as wife, child, or creditor, either by taking a policy naming such intended beneficiary, or by taking a policy payable to himself or his representatives, and transferring it.

When a husband takes out a policy upon his own life for the benefit of his wife, the policy is a contract with the husband, and the terms and conditions to which he assents attach to and qualify the policy, and determine the liability of the insurers.

The acknowledgment of the receipt of the first annual premium, embodied in and indorsed on the policy, as between the immediate parties to the contract, is but an admission and liable to be contradicted.

The policy and the premium notes given at the same time are parts of the same transaction, and together make the contract of the parties.

Notice to the agent of an insurance company is notice to the company, and the company is chargeable with knowledge of his act, and the assured is not estopped from alleging the truth of the transaction with the agent.

ALLEN, J.

The insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. He was the party contracting with the defendants, and the consideration for the agreement to insure proceeded from him, not from the wife. The statutes of this State authorize a married woman to insure the life of her husband for her own benefit, and declare that the insurance shall be payable to her free from the claims of the representatives and creditors of her husband; but the exemption is restricted to policies upon which the annual premium paid from the funds or property of the husband shall not exceed three hundred dollars.

Laws of 1840, Ch. 80; Laws of 1858, Chap. 187.

But the plaintiff had an interest in the life of her husband, and

*Decision rendered January 24, 1871.

an insurance procured by him for her benefit is good at common law. The policy would not be void as a gaming policy. This policy does not purport to have been effected or procured by the wife, or at her instance. The deceased had an insurable interest in his own life and could lawfully insure for his own benefit, or in favor of any one having an interest in his life, as wife, child, or creditor, and could secure the insurance to the party intended to be benefitted, either by taking a policy naming such intended beneficiary, or by taking a policy payable to himself or his representatives and transferring it. 1 Phil. on Ins., § 79; *Lord vs. Dall*, 12 Mass., 115.

In this case the husband agreed for the insurance, and caused his wife to be named as the beneficiary in the policy. It was nevertheless a contract with the husband, and the terms and condition to which he assented attach to and qualify the policy, and determine the liability of the insurers.

As between the immediate parties to the contract, the acknowledgment of the receipt of the first annual premium, embodied in and endorsed on the policy, is but an admission, and liable to be contradicted. It is simply evidence of the fact of payment, but not conclusive. *Sheldon vs. Atlantic Fire and Marine Ins. Co.*, 26 N. Y., 460; *Ins. Co. of Pennsylvania vs. Smith*, 3 Wharton, 520.

There is nothing in principle to take contracts of insurance out of the rule which governs and controls all other contracts, even the most solemn. The clause in a deed acknowledging the receipt of the consideration of the conveyance is open to explanation. *McCrea vs. Purmort*, 16 W. R., 460.

The evidence in explanation of the receipt here was not to show that the contract was originally void for want of consideration, but to show in what the consideration in fact consisted, and that the policy had become void for conditions broken. The evidence in explanation of the receipt was given without objection, and was clearly admissible for the purpose for which it was offered.

The policy and the notes given at the same time for the cash premium were part of the same transaction, and together made the contract of the parties. They should be read together, if necessary, to ascertain the minds and agreement of the parties. But they speak the same language, and the same condition is embraced in each. The policy accepted and held by the assured, and the notes taken and held by the insurers, express the conditions in the same terms, and the language is explicit and incapa-

ble of an intrepertation which shall vary the literal reading of the clause.

In so many words the parties have agreed that upon failure to pay the notes at maturity the policy shall become immediately void, and the insurers shall be released from all obligations under it.

The contingency has happened and the result dictated by the contract necessarily follows, and Courts can not release parties from their own contracts fairly made, or make new contracts for them. *Pitt vs. Berkshire Life Insurance Company*, 100 Mass., 500, is in all its essentials the same as the case at bar, and the Court there held, and for reasons entirely conclusive, that the policy was forfeited by the non-payment of the note, and that no recovery could be had upon it. The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction and represented the plaintiff, and claiming the benefit of his acts, and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. *Elwell vs. Chamberlain*, 31 N. Y., 611; *Bennett vs. Judson*, 21 N. Y., 238.

If the agent exceed or transgress his authority, the principal may repudiate his acts altogether; but he cannot affirm in part and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue.

There is no question of estoppel *in pais* in the case. None was found by the jury, and there was no evidence upon which it could have been predicated. There can be no estoppel in behalf of one having full knowledge of all the facts; and as the payment of the premium by a note, with conditions affecting the policy, instead of in cash, was the act of the plaintiff's agent, and as the principal is chargeable with knowledge of the act of the agent, and notice to the agent is notice to the principal, it follows that the defendants are not estopped from alleging the truth of the transaction as against the plaintiff. *Dunlap's Paley on Agency*, 261; *Hutchins vs. Hubbard*, 34 N. Y. 24; *Lawrence vs. Selden*, 1 Selden, 401; *Plumb vs. Catta. raugus Insurance Co.*, 18 N. Y., 394; *Story on Agency*, § 140. An estoppel *in pais* is well defined by Cowen, J., in *Dezell vs. Odell*, 3 Hill, 219, as an admission or statement by one individual intended to influence the conduct of another with

whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests unless the party making the admission or statement be cut off from the power of retraction. This is the substance of an estoppel *in pais*. *Reynolds vs. Lounsbury*, 6 Hill, 534; *Andrews vs. Lyons*, 11 Allen, 349; *Howard vs. Hudson*, 2 El. and Bl., 102.

In such a case it would be against good conscience, and a fraud, to deny the truth of the admission or statement thus made and acted upon, and this is the point upon which the question of estoppel turns. *Dewey vs. Field*, 4 Met., 381.

Every element of an estoppel is wanting here. The defendants by their agent, or otherwise, made no statement or representation to influence the action of the plaintiff, or which could have been supposed would influence her conduct in any respect; and there was no evidence tending to show that she was influenced by the acknowledgment of the receipt of the premium, or that she could or would have paid the premium at any time or under any circumstances. Neither was there any waiver of the condition of the policy or the note. An unsuccessful demand of payment could not be construed into an abandonment and waiver of any of the terms and conditions of the note or policy, or as an alteration of the contract in any particular. The same fact existed in *Pitt vs. Berkshire Life Insurance Company*, *supra*, but was not deemed important, or as affecting the rights of the parties. The Court below upon the case should have given judgment for the defendant, and this Court may give the judgment which that Court should have given. The judgment should be reversed, and judgment for the defendant on the verdict with costs should be given.

SUPREME COURT OF MICHIGAN.

Error to Lenawee Circuit Court.

THE NORTH AMERICA FIRE INS. CO. OF THE	}
CITY OF NEW YORK, <i>Plff in Error</i> ,	
<i>vs.</i>	
GEORGE B. THROOP, <i>Def't in Error</i> .*	}

Where the agent of the company is informed of material facts and writes the application for the insured, evidence is admissible to prove that he was informed of the facts, and the company is as much estopped from denying such knowledge as if it was an individual insurer personally present and acting.

*Decision rendered January 4, 1871.

A witness, on cross examination, has the right to look over the whole paper before answering whether a signature to an instrument of writing shown him, is his signature.

The failure of the insured to disclose the fact of a previous fire and his reasons to fear danger from incendiaries in answer to inquiries made in the application is material, and it is not competent to submit the question of such materiality to the jury.

In such case it is no defense that information was given sufficient to put the agent of the company upon inquiry.

COOLEY, J.

This record is brought before us by writ of error, for a review of certain rulings by the Circuit Court on the trial of an action upon a policy of insurance. The policy, it appears, was not produced on the trial, and was claimed to have been destroyed by the fire which burned the property insured; and parol evidence was therefore given of its contents.

The declaration averred that the insurance company, the defendants below, insured the plaintiff "against loss or damage by fire to the amount of three thousand dollars; that is to say, five hundred dollars on his three-story brick and frame building situated on the east side of South Main street, near the Michigan Southern and Northern Indiana Railroad Company, in the city of Adrian, used as a steam bending factory; and two thousand five hundred dollars on lumber and stock of felloes, poles, bows, and shafts, manufactured, and in process of manufacture, contained in the above-named building." The plaintiff having given evidence of the loss of the policy, testified to its contents as follows: "The written part of the policy was, as near as I can remember, as follows: The rate was three and a half per cent.; the whole consideration one hundred and five dollars. The whole amount insured was three thousand dollars, which was distributed as follows: Five hundred dollars on the three-story brick and frame building situated on South Main street, near the Southern railroad track, and adjoining. It was on the east side of Main street. It stated that the building was used for steam bending works. There was also two thousand five hundred dollars insurance in said policy on the stock, lumber, and goods manufactured, and in process of manufacture, in said building. The stock consisted of bows, poles, felloes, shafts, &c. I don't remember whether these items were specified in the policy, but they were in the building." Having thus stated the terms of the contract, as near as he professed to be able to do, the plaintiff proceeded to give the particulars of the loss. After stating the value of the goods manufactured, and in process of manufacture, in the building at the time of the fire, he proceeded to

say: "I also had 100 m. of lumber, which cost me about \$24 per thousand, and was worth about \$30. About one-third of it was in the lower story of the building, the rest in the yard."

The plaintiff, it appears, claimed that the lumber in the yard, as well as that in the building, was covered by the policy. To establish this claim, the following questions were put to the plaintiff, while on the stand, and the subjoined answers elicited.

Question. Did you show Collyer, the agent who took the insurance, the lumber outside as well as inside the building, and did he examine it for the purpose of insuring?

Answer. He was down there several times, and looked the place over two or three times, outside as well as inside the building, and took its general surroundings.

Question. What did you state to him you wanted insurance upon?

Answer. On the whole property; on the lumber outside as well as inside the building. It would be outside one day, and inside the next.

These questions and answers were objected to as incompetent, but the objections were overruled.

We have been unable, after considerable reflection, to discover any ground upon which the rulings in admitting this evidence can be sustained. It is conceded that it was not competent to extend or enlarge by parol the terms of the written contract, but it is argued that the case comes within the principle of those cases of which *Facey vs. Otis*, 11 Mich., 213, affords an example, in which parol evidence has been received to show the circumstances under which a contract has been made, for the purpose of explaining its contents when ambiguous; or of another class of decisions, like *Malleable Iron Works vs. Phoenix Insurance Company*, 25 Conn., 465, in which it has been held that where parties come to an agreement concerning the meaning of equivocal words employed in their contracts the Court will construe them according to the understanding arrived at.

To make either class of decisions applicable, we must first be able to perceive that words have been employed which are ambiguous or equivocal in meaning. The argument for the assured is, that in the written policy, as stated in his evidence, the words "in said building" refer or may refer to the words "in process of manufacture" only, leaving the words, "stock, lumber, and goods manufactured" to stand by themselves; in other words, that while the insurance on goods in process of manufacture is

restricted to those in the building, the stock, lumber, and goods manufactured are insured without reference to their actual locality. And if there can be any doubt concerning the natural construction of the words being as here claimed, then, it is further argued, one or other of the principles before mentioned is applicable, and the insurance must be extended to the lumber, if such appears to have been the understanding the parties had of their contract at the time they made it.

But we think any construction of the written portion of the policy, as given by the plaintiff in his evidence, which will confine the reference of the words "in said building" to the goods in process of manufacture, is forced and unnatural, and so opposed to any meaning of the parties to be gathered from the natural and most obvious construction of their language, as to strongly impress one that, thus construed, the contract would, in effect, be a new one, differing materially from the one the parties attempted to express by the written instrument. No reason was suggested on the argument, or now occurs to us, why the scope of the words "in said building" should or could be thus restricted, beyond the circumstance that they stand in immediate juxtaposition to the words "in process of manufacture," and more remote from the words "stock, lumber and goods manufactured." But this is obviously a very unimportant and quite accidental circumstance. In any enumeration of the property insured in the building, some class of it must be mentioned last, but the qualifying words which follow, cannot, without violence to the language, be restricted exclusively to the article last specified, where, as in this case, all are so mentioned and connected as to make the restriction plainly applicable to all. If the purpose was to confine the insurance to the property in the building, it would be difficult to choose more apt and proper words than are here employed to indicate that purpose; while, if a more restricted application of the words "in said building" were designed, the parties, it seems to us, have not only failed to express their meaning, but have expressed the opposite.

But whatever might be the construction of the policy, as it is given by the plaintiff in his evidence, there is no room for doubt, or for a suggestion of doubt, upon it as set forth in the declaration. There the insurance is stated to have been "on lumber and stock of felloes, poles, bows and shafts, manufactured and in process of manufacture, contained in the above

named building." No construction of this sentence, whether upon grounds of strict grammatical accuracy, or of ordinary use, can fail to apply the words "contained in the above named building," at least to the "stock," if not to both the "lumber and stock," which are apparently its subjects; though if restricted in its reference to the stock alone, it would be fatal to the argument which the plaintiff makes on the evidence, where he excludes from the qualifying words everything but the goods in process of manufacture; all the others, according to his claim, being covered by the insurance, whether in the building or not. The result would be that the plaintiff, if he construes the policy rightly, must fail, because it varies from the contract declared upon. But in our opinion he does not construe it correctly. The contract declared upon, as well as that proved, covers only the lumber and stock in the building; and its terms are too plain to admit of parol evidence upon any theory that they need or will admit of explanation, giving them a broader scope and meaning.

The second alleged error which is relied upon, relates to the admission of evidence touching encumbrances upon the property covered by the insurance. To show the materiality of this, it is necessary to state that the defendants put in evidence an application purporting to be signed by the plaintiff, and which their witness testified was the application on which the risk in question was taken. This application contained the following questions and answers:

Question. "Is there any encumbrance on the property?"

Answer. "No."

Question. "If mortgaged, state the amount and to whom?"

Answer. "Two thousand dollars; Topliff & Day."

Appended to this application was the following undertaking: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and material to the risk, and the same is hereby made a condition of the insurance and warranty on the part of the insured."

The plaintiff denied signing this application, but testified that he signed a different one, to which an agreement was appended, which, so far as is material to be here stated, was as follows: "And the said applicant covenants and agrees with said com-

pany that the foregoing is a just, true and full exposition of all the facts and circumstances in regard to the condition, situation, hazard, and the value of the property to be insured, so far as the same appertain to the risk." The plaintiff was then allowed, under objection, to give the following evidence concerning encumbrances upon the property: "I suppose I had told Collyer, the agent, about the encumbrances as much as eight or ten times. He and I boarded at the same house, and he kept at me all the time to insure with him. He knew just as much about it as I did. I told him about the mortgages to Hunt, and to Topliff & Day, and a mortgage to W. H. Stone, on which there was nothing due or payable. I told him there was from two hundred and fifty to three hundred dollars due on the Hunt mortgage, and that it was originally made for five hundred dollars. I told him the Topliff & Day mortgage was originally for two thousand five hundred dollars, and that it had been reduced to from two thousand to two thousand two hundred dollars. These were about the amounts that were due on the property then. He said it would make the application look bad to put in all these mortgages while there was so little due on them."

The objection to this evidence was that it had a tendency and purpose to vary the written contract, in which the plaintiff covenanted that there was only one mortgage of two thousand dollars on the premises, and would in effect exempt from the covenant another mortgage of two hundred and fifty dollars or more, which the plaintiff knew about and had in mind when the application was made, and also any sum over two thousand dollars which might be owing on the mortgage to Topliff & Day.

We are of opinion that at the time this evidence was offered and received it was competent and proper evidence. The defendants had put in a paper which they claimed was the application which the plaintiff had signed. The plaintiff denied having signed it, but admitted having subscribed a different one, which was not produced. The question, what were the contents of the application actually made, and what covenants it contained, was, therefore, a matter of dispute, and, as bearing upon this, the conversation between the parties concerned in putting it in writing was, or might be, of material consequence. If the agent drew the application, and was fully informed of all material facts, the inference that these facts, so far as was customary, or as the blank form used by the company required,

would be correctly set forth in the application, was very natural and strong. The plaintiff, we think, was entitled to the benefit of this inference, if the jury should be of the opinion that he was truthful when he testified that the paper produced was not the one he signed.

If, therefore, this part of the case rested exclusively upon the action of the court in admitting this evidence, we should not find it important to go further, and should hold the ruling to be unexceptionable. But the Circuit Judge, as we understand his charge to the jury, instructed them, in substance, that even though the application produced by the defendants was the one signed by the plaintiff, yet if the defendants' agent filled out the application, and the plaintiff had previously given him full and correct information concerning the encumbrances, then the failure to specify the Hunt mortgage in the application would not vitiate the policy or preclude a recovery. This we understand to be the effect of his charge and refusals to charge, so far as they concerned the point now under discussion.

The question, then, is this: When the party applying for insurance states in his application that the property was encumbered to a certain amount only, and then covenants that the application is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property so far as he knows, and as they are material to the risk, and makes the same a condition of the insurance and a warranty on his part, and it thus turns out that the encumbrances are untruly stated, is it any answer to a claim of forfeiture of the policy that the insurer was correctly informed concerning the encumbrances at the time of taking the risk, and prepared the application himself after such information was given him?

The question thus stated is one which has been the subject of much legal controversy, and it cannot be denied that there are many cases which fully sustain the position for which the plaintiffs in error contend. *Jennings vs. Chenango County Mutual Insurance Company*, 2 Dennis, 75, is a leading case of this character. In that case the application was so worded as to require a statement whether there were any buildings within ten rods of the one to be insured, and it was filled up in such a way as not to show any. It appearing that, in fact, there was a building within that distance, the court was of opinion that it was not competent to show by parol that the agent of the in-

surers prepared the application, and that he was fully informed of the location of such other building at the time, and framed the application to his own satisfaction. *Brown vs. The Cataraugus County Mutual Insurance Company*, 18 N. Y., is to the same effect, and many others might be mentioned. Some of these cases appear to assume that there is something peculiar in the contract of warranty contained in a policy of insurance which should distinguish it from other warranties, though they do not undertake to point out specifically what this peculiarity consists in. A contract of warranty does not, in general, unless such is the plain intent of the parties, extend to defects palpable to the senses, and within the observation of the parties when the contract was made; *Schuyler vs. Russ*, 2 Caines, 202; *Long vs. Hicks*, 2 Humph., 305; *Dilland vs. Moore*, 2 Eng., 166; but each of the cases above cited refused to apply this rule to a warranty in an insurance policy, though in the case in Denio the court very justly say, "it may be difficult to assign a satisfactory reason for distinction in this respect between a warranty in a policy of insurance and one upon a sale of property." And see Ang. on Fire and Life Insurance, § 143; and remarks of Nelson, Ch. J., in *Turley vs. N. A. Fire Insurance Co.*, 25 Wend., 374. Indeed, it would seem that if any distinction was to be made, it should, for very obvious reasons, not be one discriminating in the direction which these cases appear to. The warranties required of applicants for insurance are against those things which are supposed to increase the risk; but there is no definite line which can always be drawn between what will and what will not have that effect; and sometimes a fact which is material may be so in such slight degree as to make its omission appear to the parties to be unimportant. A building, for instance, located within ten rods of another, may or may not have a tendency to increase perceptibly the risk of injury to the latter by fire. If both were of wood, and within a few feet of each other, the hazard might be greatly increased by the proximity; but if both were small structures, built of brick or stone, and situated a considerable distance apart, an insurer would not be likely to make any difference in his rates because that distance fell a little short of ten rods; and both parties might well suppose, in such a case, that an enquiry for buildings within ten rods would not call for a mention of such a structure, which, if mentioned, would not be regarded. So if one were to ask insurance to nearly the full value of a building, the question of encumbrance

upon it might be very material, where, if he sought a policy for five hundred dollars only on a building worth ten thousand, the question whether the property was or was not mortgaged for some small sum would not in the least affect the premium demanded. Encumbrances are important, *first*, as bearing upon the extent of interest which is to be covered by the policy, and, *second*, in showing how far the insured is interested in protecting it against destruction, or, on the other hand, in suffering it to be destroyed; and when the value of the property is so far in excess of both encumbrance and insurance as to make it the interest of the insured to guard and protect the property with constant vigilance, the fact of encumbrance, though material in a legal sense and in slight degree, may, nevertheless, well be treated by the parties as unimportant, when the contract of insurance is being agreed upon.

In all these cases, where the particular fact called for by an interrogatory is unimportant, or nearly so, under the circumstances of the particular case, it is very easy for the assured to be led to suppose that such interrogatory, which he knows was prepared generally, and for the purpose of meeting the cases in which it would be of practical importance, was not to be relied upon in his own case; and if the insurer himself, or his agent, drafts an answer to such interrogatory, in which he treats it as immaterial, and does not observe strict accuracy in his statement of facts, the assured might well suppose he would be thought captious and hypercritical if he should insist upon answers exactly correct, when the party seeking the information, and who alone was interested in it, was satisfied with statements less accurate, and which, with full knowledge of the facts, he had written out to suit himself.

We cannot, in construing a contract of fire insurance, overlook the customary manner in which such contracts are obtained. The form which the negotiation apparently assumes is this: The one party applies to the other for insurance, and agrees in his written application that the facts material to the risk are as therein set forth. The other party issues the policy, assuming the risk on the condition that the facts are as represented. The appearance, therefore, is of two parties meeting on equal terms, who might be supposed to frame their respective propositions and undertakings with a view to the protection of their own interests. But, in fact both application and acceptance are usually drawn by the insurer himself, or his agent, into whose hands, as

a person understanding the business thoroughly, and, therefore, knowing what should and what should not be inserted in the writings, the assured places himself and his interests. We do not undertake to say that this is always the case, but this course is sufficiently general to warrant our taking notice of it as usual and customary. The insurer occupies the position of an expert, who assumes to understand what the papers should contain. Being an expert, he undertakes to draw a contract between himself and another person, who will, generally, be ignorant of the exact requirements; and under such circumstances the insurer is under a strong moral obligation to so draft the papers as to make them assure to the opposite party the protection for which he pays his money. If there has been no fraud and no concealment, but a full and frank statement of all the facts, and the insurer has framed the papers to suit himself in view of all the circumstances, the law would justly be subject to the reproach of favoring deception and fraud if the insurer was allowed to retain the premium, and, at the same time, repudiate the contract for his own failure to make its recitals correspond exactly with the facts.

In this case it is conceded that the oral answer made to the enquiry about encumbrances mentioned the large mortgage, but it disputed that it specified the small one also. The plaintiff claims that he gave the agent full information on the subject, and insists that if there was any failure to mention it in the application, it was for reasons operating exclusively on the mind of the agent, and not affecting his own action. We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he himself had drafted those recitals, and was morally responsible for their truthfulness. *Plumb vs. Cataragus Mutual Ins. Co.*, 18 N. Y., 394; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550, (overruling earlier New York cases); *Anson vs. Wumesheik Ins. Co.*, 23 Iowa, 84; *Malleable Iron works vs. Phoenix Ins. Co.*, 25 Conn., 465; *New England M. and F. Ins. Co. vs. Schettler*, 38 Ill., 166; *Hough vs. City Fire Ins. Co.*, 30 Conn., 10; *Patten vs. Farmers' Fire Ins. Co.*, 40 N. H., 383; *Columbia Ins. Co. vs. Cooper*, 50 Penn. St., 331; *Olmstead vs. Aetna Live Stock, &c., Ins. Co.*, 20 Mich. And we think the estoppel is precisely the same when the agent of the insurer drafts the papers as it would be in the case of an individual insurer

who was himself personally present and acting. *Rowley vs. Empire Ins. Co.*, 36 N. Y. 550; *Anson vs. Wumesheik Ins. Co.*, 22 Iowa, 84; *Marshall vs. Columbian Fire Ins. Co.*, 27 N. H., 165; *Peoria M. and F. Co., vs. Hall*, 12 Mich., 214; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 31 Conn., 517.

Another error assigned arises upon the following proceedings:

The plaintiff, while upon the stand as a witness, having denied his signature to the application produced by the defendants as the one upon which the policy issued, was cross-examined, with a view to test the truthfulness of this denial, and the genuineness of the alleged signature. And in the course of the cross-examination the counsel for the defendants presented to the witness a paper, folded so as to show only the name of the plaintiff in writing, and asked him if the signature there pointed out was his. The counsel for the plaintiff insisted that the witness had a right to look over the whole paper before answering. To this the counsel for the defendants objected, but the court directed that the witness should be allowed, before answering, to examine the whole paper. And, having done so, the witness admitted the signature to be his.

Where an expert is undertaking to testify concerning handwriting, it is difficult to set any bounds to an examination which may reasonably tend to test the accuracy of his knowledge, skill and judgment. Obviously, it would be proper to subject him to tests which would be entirely improper, and tend unjustly to embarrass and confuse one who did not assume to be an expert, but who might, nevertheless, have some personal knowledge of a particular specimen of handwriting submitted to his inspection. A person who can not even read handwriting, may, nevertheless, be able to testify to a particular signature which he has seen made; for particular marks upon the paper may identify beyond question the instrument whose execution he witnessed. But if such a witness were required to look at the signature separated from the instrument, and to say, without any of the aids which the marks upon the instrument would give him, whether that was or was not the signature he saw written, it is perceived at once that the requirement would be unfair, and a categorical answer impossible. Now, it may be said that every man is an expert as regards his own handwriting, and may rightfully be subjected to the same tests, when he is called to testify concerning it, that other experts might be tried by; but in fact a large proportion of the people do not possess or assume to possess any

such knowledge of the peculiarity of their own handwriting, if any such there are, distinguishing it from any other, as would justify their expressing the opinion whether isolated signatures, which might be theirs were in truth so or not. The handwriting of a man who writes but little may never acquire any very definite characteristic, or any great uniformity; and a very accurate penman may possibly copy the correct standard of penmanship so nearly as to render it difficult for him to determine whether a particular word shown him was written by himself or by some other writer who with equal facility has copied the same standard. All writing in the same language follows in greater or less degree the same models, and some uniformity is always to be expected. If all houses were constructed in the like degree after one plan, it might nevertheless be possible for any house builder to recognize the several houses he had built, if he could see each with its surroundings; but to require him to take a view of one with the surroundings excluded and to say whether he constructed it or not, could hardly be fair to the witness, or a method likely to bring out the knowledge, if any, which he actually possessed. A man may recognize even a casual acquaintance if his whole person—size, height, carriage and peculiarities of deportment—may be observed, when if he were compelled to judge by single feature, or even by a view of the whole face, he might easily be deceived in consequence of missing something upon which his recognition in part depended. Any examination based upon such partial view might be useful if entrapping the witness were the purpose to be accomplished; but it could not be a reasonable mode of arriving at the truth. The witness in any such case is fairly entitled to all the aids to recognition which the circumstances and surroundings afford; and we think the Court justly and very properly required that he should have them in this case. This by no means precludes a careful and critical examination of the witness after the general question has been answered, with a view to testing the accuracy of the opinion expressed and grounds upon which it is based. A thorough sifting of the testimony of the witness is always admissible; but justice to him requires that before he is subjected to that process, he should be allowed to give his testimony in view of all the facts bearing upon the point under examination, so far as they may be within his knowledge, instead of being restricted to a partial and imperfect view, by means of which the likelihood of error, mistake and embarrassment may be greatly increased.

One other alleged error requires notice. In the application presented in evidence by the defendants, were the following question and answer:

Question : "Incendiarism; have you any reason to believe your property is in danger from it?"

Answer : "No."

In the blank form produced by the plaintiff, and which he claimed was filled up and signed, the corresponding question is as follows :

"Has a building on the site of this been burned? Have you any reason to believe your property is in danger from incendiarism? Have you ever suffered a loss by fire? If so, how did the fire originate, and in what office were you insured?"

As bearing upon the importance of these questions in the case, the following evidence of the plaintiff is given :

Question : "State whether, previous to the time of making your application and taking your policy, you said anything to Collyer as to your fears of incendiarism, and if so, when, and what did you say?"

Answer : "I talked with him very freely. I offered to insure myself against all risks but incendiarism, if he would take it cheaper on that risk alone. I talked with him about being afraid of incendiaries the fore part of the month, and previously; not one, but several conversations; that I was a manufacturer and was discharging hands, and they would be very angry at me. I took precautions and kept a watch several nights."

Question : "State whether anything occurred to make any difference in regard to incendiarism, and if so, what?"

Answer : I was there several nights. Joe Bennett and I had talked it over about every day, and he was not satisfied that it was an attempt to burn it, or whether it was accidentally, from the railroad, and he said, and we both concluded, that there was not any more danger of that than of any other building, if as much; that if any one had attempted to fire it, of which we were not sure, they wouldn't be any more likely to come there again than to any other building, and probably not as likely, and I discontinued my watch, and took my books and papers back to the building. I had taken them away some days before. There was no other insurance on the lumber and stock but this, and none on the building but this and the Home Company."

Cross examination : "Directly under one of the windows there was a heap of shavings which had been fired, and had

burned up along the side of the building, and had partially burned a pile of felloes. There were two or three lights of glass broken above the fired place, which was on the side of the building nearest the railroad track. The building at one corner was about eleven feet from the track. The fire was inside the building. We came to the conclusion, from examination, that the fire was not an accident, and because of that I kept watch. Collyer kept trying to get the risk while I was talking to him about the danger of incendiarism. I told Dr. Knapp the same as I did Collyer, and he took my risk and carried it two or three days till he sent it to the Company and they had rejected it. I never told Collyer about the attempt to burn the building. We talked over the attempts that had been made in town to burn two or three other buildings, and the risk of such fires generally, but I did not tell him of any risk of mine more than of others in particular. Did not tell him of this attempt at all. I told him about discharging men, and that manufacturers got even down on them, by discharging them. He knew all about my trouble with Bingham. I suspected a man of firing it when I discovered the attempt, and when the building was burned I suspected the same man. I did not tell Collyer of this, but he knew I was having trouble with Topliff. I told Eldredge about my fears, and he advised me to get insured. I met him as I came out of Collyer's office. He was my counsel at that time. I told him there was one question I looked at twice. It was 'Have you any fears, or have you any reason to fear an incendiary fire?' and he asked me if I had, and I replied that I had not now, and he said it was legal, or all right. There was such a question as that. That question was in the application I did sign, and I answered 'No' when I made out the application."

Upon this evidence the Court was requested by the defendants to charge the jury as follows:

1. "If the jury believe from the evidence that at the time of procuring the policy sued upon the plaintiff knew that an attempt had been recently made to burn the premises insured, and failed to disclose that fact to the defendant's agent, who issued the policy, the defendant is entitled to recover.

2. If the jury believe from the evidence that a written application was made by the plaintiff to the defendant, upon which the policy sued on was issued, in which application the plaintiff stated that he had no reason to fear that his property was in danger from incendiarism, and they find as a matter of fact that

he had such reason, then their verdict must be for the defendant."

These requests were refused, and the court charged as follows instead :

"If the jury believe from the evidence that at the time of making the application the plaintiff had ceased to fear from incendiaries the burning of his property, and did not think he had any reason to believe that his property was in danger from it, then the fact that it was once fired will not vitiate the policy, and was not a breach of warranty expressed by the answer to the question on the subject, if there was such warranty."

"If the jury believe from the evidence that an attempt had been made to burn the building covered by the policy of insurance sued upon, shortly prior to the application made by the plaintiff for such policy of insurance, and that said plaintiff then knew of said attempt and did not disclose it to the agent who issued the policy ; if the jury believe that a knowledge of such attempt was material to the risk, their verdict must be for the defendant, if the agent of the defendant had not sufficient knowledge to put him upon inquiry as to said prior attempt to burn said building."

Now we think that the Court in the refusals to charge and in the charge given, committed two errors which may have affected the verdict of the jury very materially to the prejudice of the defendants: *first*, in assuming that an attempt to fire the building insured might be a circumstance not material to the risk : and *second*, in treating the information, which was sufficient to put the agent upon inquiry, as sufficient to justify the plaintiff in his failure to communicate the facts within his knowledge, notwithstanding his attention was particularly called to the subject at the time the application was prepared and signed.

Whichever application the plaintiff signed, his attention was directed by proper interrogatories to the subject of incendiarism. And it cannot be denied that an attempt to destroy by fire the property upon which insurance is sought, is usually regarded as a circumstance of very high importance, and as one that presumptively is always material to the risk, though possibly in any particular case the insurer, if he was cognizant of all the facts, might know that the particular attempt that had been made was not likely to be repeated. Without explanation the inference must usually be, that an effort to fire the building of another indicates an evil motive, which is likely to induce other attempts until the object is accomplished ; and no prudent insurer would

treat the attempt as immaterial, unless he had satisfied himself by careful inquiry, either that the motive for making it no longer existed, or that a renewal of the attempt had for some other reason become impracticable or unlikely. No one can question its being both proper and prudent for the insurer in his application for policies to treat this circumstance as material, and to require specific and truthful answers concerning it; and where he has done so, and made their truthfulness a condition of the contract, we do not think it competent to submit to a jury the question of materiality, and allow them to find, in opposition to the contract of the parties and to general experience, that it was unimportant. We think a fact thus specifically inquired about, and generally of such vital importance, is to be considered material as matter of law; and defendants were entitled to a charge accordingly.

But it is argued that the agent had full information of the plaintiff's fears of incendiarism, and being thus warned, he was sufficiently put upon inquiry concerning the attempt to burn the building, if one was made. This doctrine, as applied to the facts of this case, strikes us as very dangerous. It is not pretended that the plaintiff ever informed the agent of the facts which led him at one time to think an attempt at incendiarism had been made; and indeed the contrary is sworn to by him. The plaintiff's general talk about a fear of the building being burned was precisely of that character to be well calculated to lead the agent away from any supposition that this particular building had been, or was likely to be, singled out from among others in the same city for destruction; and his answer to the interrogatory in the application, if not untruthful, was at least wanting in candor and frankness, and had a tendency to mislead. When a person is particularly interrogated regarding a subject peculiarly within his own knowledge, and the other party is expected to contract with him in reliance upon his answer, and the answer is made misleading, if not untruthful, it seems to us a perversion alike of law and justice, to say that he shall have the advantage of his uncandid answers if he can convince a jury that the other party was wanting in prudence in relying upon them, because of having notice extrinsic these answers which was sufficient, if followed up by inquiries in other quarters, to have led him to a knowledge of the exact facts. The insurer has a right to know the truth from the assured himself; and if his inquiries addressed to him failed to elicit the truth, it is no ex-

cuse for the latter, either in morals or in law, that the insurer, if sufficiently distrustful and suspicious, and inclined to rely upon what he had heard from other sources, rather than upon the word of the assured himself, could be regarded as "put on inquiry" respecting the truthfulness and candor of the information given him, in consequence of something that he had heard incidently at a time when perhaps he had no special occasion to charge his memory with it. He goes to the authority that ought to be the best, and he has a right to rely upon what is told him. If it were allowable to submit to a jury the question of his prudence in doing so, it would be impossible for that tribunal, in most cases, to be so fully possessed of the exact condition of his information at the time as to be enabled to determine whether he was or was not guilty of negligence in such reliance.

The danger of such a rule as was laid down by the Circuit Judge appears well illustrated in this case. It was submitted to the jury to say whether the agent had not sufficient knowledge to put him upon inquiry as to a prior attempt to burn the building; and if they reached that point at all in the course of their investigations, they must have found that he had. But we look in vain through this record for anything upon which such finding could justifiably be based. The expression to Collyer of the plaintiff's fears was not at all calculated to impress him that any attempt had as yet actually been made; and no information is shown to have come to the agent from any other quarter which could justly charge him with want of prudence in not pursuing inquiries in other directions. The effect of the charge was to permit the jury, in construing and applying the contract, to substitute their own views of what was material, and of what was prudent for the insurer, for the views of the parties embodied in the writings, which we have already seen were eminently reasonable, and which they had agreed upon as the evidence of what the contract was to be.

These views render it necessary that there should be a new trial. We have not examined in detail all the errors assigned, because the views expressed render some of them unimportant, and we think what is here said covers the whole ground sufficiently for the purposes of a new trial. We think the Court erred in charging the jury as requested by the plaintiff, that "if the jury believe from the evidence that the application produced by the defendant is not the genuine application signed by the plaintiff, and

upon which the policy issued, then there is no proof in the case upon which the jury are authorized to find what the contents of that application were, or whether there was any warranty in it to affect the plaintiff's right of recovery." The evidence of the plaintiff sufficiently shows that he was inquired about concerning attempts at incendiarism, and that he gave a negative answer. It also shows that he warranted the correctness of his answers so far as pertained to the risk. Whether, if no such inquiry had been made by the application, and the plaintiff had failed to make a full disclosure, the policy would have been void for that reason, is a question which does not arise upon this record.

The judgment must be reversed, with costs, and a new trial ordered.

SUPREME COURT OF APPEALS OF VIRGINIA.

THE MANHATTAN LIFE INS. CO., *Pl'ff in Error.*

vs.

CORBIN WARWICK, *Def't in Error.**

A policy issued in consideration of a certain sum paid at the time of issuing the policy, and a like sum to be paid annually during life, is one entire contract for the whole term of the life, and not a contract from year to year.

A contract, made by the assured in Virginia, with an agent, in that State, of a company belonging in New York, was a Virginia contract, and the premiums were to be paid in Virginia and not in New York.

A corporation cannot exist outside the State in which it is incorporated, and has no powers or rights in another State, except on such conditions as that State may impose.

An endorsement upon the face of a policy, inconsistent with its terms and legal effect, or repugnant thereto, is void.

The breaking out of the war did not annul the contract between the assured, living in a seceded State and an insurance company belonging in a non-seceded State, or release the company from its obligations under the contract.

Nor did the war operate as a revocation of the agency of an agent of the company in the seceding State.

If the agent of the company to whom payment of premium is to be made, is not provided with the printed receipts required, the company will be held to have waived the requirement, and payment without them will be considered a sufficient compliance.

ANDERSON, J.

In July, 1857, the defendant in error, for his sole use, effected a policy of insurance for \$10,000 with the Manhattan Life Insurance Company, the plaintiff in error, upon the life of his brother William Sidney Warwick, of Powhattan County, Virginia, who was largely indebted to him. The plaintiffs in error were a New York company, and the policy was effected through their agent in

*Decision Rendered April 18th, 1871.

Virginia, J. B. Macmurdo. The premiums on the policy were punctually paid, by the defendant in error, to their agent in Richmond, up to July 23d, 1862; and the premium for that year, due on that day, he then offered to pay to said agent, in New York funds, but he refused to receive payment under alleged instructions from his principals not to renew or continue policies. Four months after, on the 23d of November, 1862, William Sidney Warwick died, of which the company had due notice. After his death the company refused to pay the policy to Corbin Warwick, and he brought this suit to recover it in the Circuit Court of Richmond City, which rendered judgment in his favor for the amount of the policy, less the last premium, and the company have brought the case here upon a writ of error.

The case presented by the record is this, in brief: They refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy, because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to \$5,155, besides interest, and they invoke the intervention of this Court to sustain them in these pretensions. If this was the contract, fairly interpreted according to its spirit and legal effect, however harsh in its operations upon the defendant in error, it must be carried out.

The first question, therefore, which we have to consider is, what was the *contract* between these parties? Without encumbering this opinion with a minute and critical examination of the policy, I will simply state what, in my opinion, the contract is, according to the legal import and effect of the policy. It is a contract of the company, by deed poll, to pay to Corbin Warwick for his sole use, ninety days after due notice, and satisfactory evidence, of the death of William Sidney Warwick, \$10 000 for the consideration of \$1,031 in hand paid by the said Corbin Warwick, and a like sum of \$1,031 to be paid by him, annually, on the 23d of July, for the term of the natural life of the said William Sidney Warwick; subject to defeasance upon the nonperformance of various conditions, minutely detailed; among others, the non-payment of the premiums, or either of them, on the day they fall due—in which case the company is not to be liable for the sum asured, or any part thereof; but the policy shall cease and determine. And it is further stipulated that, in every case, where the policy shall cease or become void, all previous payments thereon shall be forfeited to the company. The policy is one entire con-

tract, not from year to year, as the premiums shall be paid, but for the whole term of the life of William S. Warwick, upon condition that, if the annual premium is not paid on the 23d of July, the policy shall cease and be void, as was held in *Buse vs. Mutual Life Insurance Company*, (26 Barb., 556), upon the construction of the policy in that case, the terms of which are very much the same as in this. That case, and also the case of *Howden, admx., vs. Guardian Life Insurance Company*, (1 Bigelow, 218, 97. Mass. R., 144,) fully sustain this construction. It is not a contract of indemnity, as a policy against fire, for a definite period, but it is a contract to pay a certain sum of money for the consideration mentioned, upon the happening of an event which is inevitable, and only uncertain as to the time it may transpire.

It is a corollary from the contract thus understood, that the company, when they executed this deed, assumed an obligation to pay the sum assured to Corbin Warwick, from which they could not be relieved by anything they could *do* or leave *undone*; but only by the act or omission of the assured. Consequently the company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium; or by hindering or preventing the other party from paying it; or by any disability on its part to receive it, and which prevented its payment, which was not provided for in the contract. If the assured was at the place on the day when and where payment was to be made, and where he had a right to make payment, ready and prepared to make payment, but was prevented by either of the causes mentioned, it would be unreasonable to say that he had incurred the forfeiture, and, I think, it is equally clear, upon reason and authority, that the company was not thereby released from its obligation to pay the sum assured. It would be a monstrous perversion of law, and repugnant to every sense of justice, to say that this company, after having received more than half the sum assured, could, by their act, determine the policy, hold on to the money they had received, and say to their confiding victim, you may whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it.

And although the case cannot be so strongly put, I think it is equally clear that, when the assured was involved in no default, but was at the place when and where payment was to be made, ready and willing to pay, but was prevented by the disability of the company to receive payment, from whatever cause, he having had no agency in producing it, the company is not entitled to claim

the forfeiture, or to be relieved from its obligation to pay the sum assured.

The question upon this view of the case is suggested, Was the assured, on the 23d of July, 1861 and 1862, at the place where the premiums were payable, ready and prepared and offering to pay them ? He was at the office of the agent, J. B. Macmurdo, in the city of Richmond, and then and there offered to pay the premiums, which fell due on those days respectively, in the kind of funds, which the company required. On the first of those days, Macmurdo received payment in New York funds, or its equivalent, and gave his receipt therefor, in discharge of the obligation as agent of the company. On the last day mentioned, the assured offered to pay Macmurdo, the agent, but he refused to receive it, upon the ground, as he alleged, that he was instructed by the company not to receive payment, "nor to renew or continue policies." Now, upon this contract, the questions arise, first Was the city of Richmond or the city of New York the place of payment ? and, secondly, Was Macmurdo the agent, or an officer in New York the agent, to whom payment was to be made ? I think when this contract is interpreted in reference to its terms and subject matter ; the situation, character and legal status of the parties ; the act of the Assembly of Virginia, under authority of which it was made, and which must be read as a constituent part of it ; and with reference to the usage of the company, and the conduct of the parties in its execution, it must be regarded as a Virginia contract, made in Virginia, with the Virginia agent, and to be performed in Virginia, through that agent, and that it was intended by the parties, and so understood by them, that the payment of the premiums were to be made to the agent at Richmond, and, if made or tendered to him at the time they respectively fell due, it would be a fulfillment of the conditions required of the assured. To take a comprehensive view of the whole case, I cannot come to a different conclusion.

The defendant in error, and William S. Warwick, were resident citizens of Virginia, and the plaintiff in error a corporation of the State of New York. It was created by a law of that State, and cannot exist outside of its limits. It had no power to make contracts, or to do business, in Virginia, but by permission of the State. In *Paul vs. Virginia* (8 Wall., p. 178), Mr. Justice Field, delivering the opinion of the Supreme Court, says, "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts, upon their assent, it follows,

as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest. The whole matter rests in their discretion." Again, on p. 183, he says, "The policies do not take effect, are not executed contracts, until delivered to the agent in Virginia. They are then *local transactions* and governed by local laws." In *Slaughter's case* (13, Gratt., 773) J. Samuels says, "I have no doubt of the power of the General Assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the State, and of consequence, to grant permission to engage therein, only upon terms."

The Legislature of Virginia, consistently with this well established principle, enacted a law with regard to foreign corporations. Chapter 39, sec. 23, of code of 1860, provides "that no insurance company, unless incorporated by the Legislature of this commonwealth, shall make any contracts of insurance within this State until such insurance company shall have complied with the provisions of this act." The 24th section provides that every such "insurance company shall, by a written power of attorney, appoint some citizen of the commonwealth, resident therein, its agent or attorney." This is the first provision, and no foreign insurance corporation could make a contract in this State until such agent was appointed. But it imposes this further condition, that such agent shall accept service of process, &c., in these words: "who shall accept service of all lawful processes against such company, in this commonwealth, and cause an appearance to be entered in any action, in like manner, as if such company had existed and been duly served with process in this State." And the 27th section provides that service of process on such attorney shall be "sufficient service upon his principals." These provisions of the act are not words of limitation on the power of the agent, but of enlargement. The first provision requiring them to appoint an agent here is *general*, and implies, it seems to me, that the company, in all its transactions in this State, must act through that agent, and can act in no other way. It is only known and recognized in this State through that agent. It implies that the company can only make contracts through him, and receive and enforce their performance through him. He is the sole representative of the company in this State. The term implies a general agency, limited only to the

transactions of the company in this State, but would not embrace, I apprehend, by that general term, the power to accept the service of legal process, and to enter an appearance for the company when sued, if it had not been so expressed. The right of action or suit against the company in the Virginia courts, without some such express provision, would not have been required merely by providing that they should appoint a resident citizen of this commonwealth their "general agent" here. But this provision gives to the company a sort of local existence in this State, through their representative agent, and shows a purpose and design on the part of the Legislature to make its transactions within this State local and subject to the jurisdiction of the State, as effectually as if it had been incorporated in this commonwealth.

The 25th section requires the company to file a copy of the power of attorney, duly certified and authenticated, with the auditor of public accounts, &c.

The 26th section requires the company to have an agent here at all times, without interruptions, "while any liability remains outstanding on such insurance."

The 28th section imposes penalties upon the agent who shall effect policies of insurance in this State without complying with the requisitions of this act. I think, therefore, that the construction given to this act, that it only contemplates and provides for the service of legal process and the prosecutions of suits against the company in this State, is too restrictive. This more clearly appears from subsequent sections. The 29th section requires the agent to make return on oath to the auditor of public accounts, on the first Monday in October and May in every year, of the amount of premiums received, and assessments collected during the said period. And also that he "shall at the same time pay into the treasury such tax as may be imposed by law, on the amount of such premiums and assessments, and the whole sum received for policies, whether paid in money or other obligations, shall be deemed to be premiums for the purpose of this section." This section treats the agent as if he were the company in Virginia, and imposes duties on him which he could not perform if he were not the receiving agent of the company in Virginia, and this section clearly treats him as such. How could he make oath to the amount of premiums received, if they did not pass through his hands, and, indeed, who else could collect the assessments due the company in the State, and receive the premiums, he being the only agent of the company here. Or who would be willing to incur such responsibilities for

the payment of taxes as agent for the company in this State, if the premiums and assessments were not to be made through him, but to be paid directly by the parties, by whom they were payable, to the agent or officer of the company in New York ? Such an idea is repugnant to the whole scope and policy of the law.

The 30th section imposes a penalty of \$1,000 upon the agent for failing to make such return, or for making a false return. With what reason could the agent have been subjected to such a penalty by the Legislature, if it had not been intended that he should be the only agent of the company for receiving the premiums and collecting the assessments, and therefore would have personal knowledge of what he is required to affirm. A bond in the penalty of from \$1,000 to \$5,000, at the discretion of the auditor, to make the semi-annual returns, and to pay the tax, is required to be given through the agent. But the 32d section, I think, fully confirms this construction of the law. It prohibits any one to act as agent of the company, to make or renew, directly or indirectly, any contract of insurance within this State, or with any person resident therein, otherwise than in compliance with the provisions of this act, or in any way contrary to its true intent and meaning, under the penalty of \$500, for every such offense. The prohibition in this section is express. No one except the agent appointed, as is provided in this act, can make or renew such contracts for the company in this State. Consequently, a contract of insurance, or renewal made by the plaintiffs in error, within the State of Virginia, or with any person resident in Virginia, through one of its officers in New York, would fall directly within the prohibition of this 32d section. Therefore, reading the contract in connection with this act of assembly, as a constituent part of it, though it professes to have been sealed by the company, and signed by the President and Secretary, and delivered in New York, (which cannot be true as to the delivery), it was not made by them, directly or indirectly, but was made at Richmond with Macmurdo, and countersigned by him who received the advance premium at Richmond, and then and there, and not until then, it became a contract. The signing by the President and Secretary gives no validity to the instrument; but it derives its force and effect, as a contract, from the signing and delivery of Macmurdo, at Richmond, and would be as effectually, and to every intent and purpose, a contract binding upon the company, if the signature of the Secretary and President had not been affixed to it. It was not, and could not

be, a contract made with them, directly or indirectly, by the express enactment of the Legislature of the State, and their signatures to it have no effect whatever. But the policy itself stipulates that it is not binding on the company until countersigned by I. B. Macmurdo, at Richmond, and the advance premium paid. It was then a Virginia contract, to be performed in Virginia, through I. B. Macmurdo, the agent and sole representative of the company in the State. This conclusion is supported by reason and authority. *Daniels et al. vs. Hudson River Fire Insurance Co.*, 12 Cushing, 422—a case directly in point—and *Fant et al. vs. Miller & Mayhew*, 17 Gratt., 77. Interpreting the policy with reference to its terms and subject matter, the situation, character, and legal status of the parties, and the act of the Virginia Legislature, by authority of which it was made, and which must be read as a constituent part of it, I am clearly of opinion that the contract was made, and to be performed, with Macmurdo, the agent of the company at Richmond, Virginia, and that payment of the premiums to him as agent of the company at Richmond, by the defendant in error as they respectively fell due, was a compliance with the terms of the contract, according to its spirit and legal effect, and as it was understood by the parties. And if we consider it further, with reference to the conduct of the parties and the usage of the company, we shall find nothing adverse to this construction, but much to confirm it.

In view of the facts that payment could only be made to some agent of the company; that the assured resided in Virginia, where the contract was made, and that the company had an agent here, with whom the contract was made, and by the law was bound to keep an agent here uninterruptedly, through whom *alone* they could make or *renew* contracts of insurance with citizens of Virginia; to say that it was contemplated or intended by the parties, or either of them, that the assured must every year, when the premiums were about to fall due, leave the agent here and go to a distant city to pay the premium to the agent of the company there, would be a most violent presumption. That the contract was not understood as imposing this needless and burdensome condition on the assured, is shown by the conduct of the parties, and the usage, as far as it is exhibited by the record in this case, of the company. The advance premium and three subsequent annual premiums were paid here to their agent, Macmurdo, with the unequivocal acquiescence and ratification of

the company ; and if any objection was ever made, which is very questionable, to the payment of the premium due in 1861, through their agent. Macmurdo, it was not made until long after he had received it, and their agent in receiving it violated no instructions, at any rate none which they could lawfully give, as I shall show. The conduct of the parties, then, was in accordance with the interpretation which I have given to their contract.

But there is an indorsement upon the deed, to which no reference is made on its face, purporting to be a "notice." If this indorsement upon the deed is inconsistent with its terms or legal effect, and repugnant thereto, it is void. *Pullerton vs. Agnew*, 1, Salkeld, 172.

I propose now to notice only one clause in connection with the point I am considering. It is in these words : "No payment of premium binding on the company, unless the same is acknowledged by a printed receipt signed by an officer of the company." Is that indorsement inconsistent with the construction I have given to the contract, that the premiums were to be paid here, to the agent, Macmurdo ? It is only in reference to that point that I propose now to consider it. If it is a condition inconsistent with the deed upon its face, or according to its legal effect, upon the authority cited, it would be void. But I do not think it is, in this point of view. It does not require that the *payment* shall be made to an officer. It only prescribes a particular kind of evidence, a printed receipt signed by an officer, nor does it exclude the signing by the agent at Richmond. If we will now turn to the receipts which were actually given, we shall find that it does not mean that *payment* shall be made to an officer in New York ; but that, on the contrary, the right of the party to pay to the agent at Richmond is not taken away by this endorsement. To each of these receipts is annexed a condition or declaration, in these words : "Not binding until paid, and countersigned by I. B. Macmurdo, Esq., agent at Richmond." That declaration, annexed to the receipt, shows most unquestionably that when the receipt was signed by the secretary the money had not been paid ; and it shows further, that the money was to be paid to Macmurdo, the agent at Richmond, Va. ; and when paid to him there, he was to sign the receipt and deliver it to the assured. This usage of the company, if it may be so called, is in perfect accord with the foregoing interpretation of the contract.

I am clearly of opinion, therefore, that according to the true intent and meaning of the contract, the premiums were to be paid by

the assured to the agent of the company in Richmond, Va., and not to the office or agent of the company in New York.

But it is contended for the plaintiffs in error, that Macmurdo was not the agent of the company on the 23d of July, 1861, when the premium for that year was paid him; or on the 23d of July, 1862, when the premium was tendered to him by the assured, and by him refused; because they say that the war, and also their letter to him of the 30th of May, 1861, was a revocation of his power. We will consider the assumption on both grounds.

But there is another postulate of the counsel for the plaintiffs in error, which lies back of this, and should be considered first, or in connection with it; and that is, that the breaking out of war annulled the contract between the parties and exonerated the plaintiffs in error from all obligation under it. Forfeitures are not to be favored; and I should be very reluctant to apply the rule "that war dissolves or suspends contracts between alien enemies," to such a contract as this, and would not do it unless it comes strictly within the rule. As was remarked by Ch. J. Kent, in *Clarke vs. Moony*, 10th Johns., the ancient severities of war have been greatly and justly softened by modern usages, the result of commerce and civilization. And the doctrine once held in the English courts, that an alien's bond became forfeited by the war, would not now be endured. That would not be more severe and revolting to our sense of justice, it appears to me, than to hold that the assured had in this case, by the war, forfeited the money he has paid, and has rights under this contract. The contract in this case was partly executory and partly executed. It was altogether executory on the part of the company, in the sense that they had done nothing yet towards the performance on their part. But it had been largely executed on the part of the assured, whereby he had become invested with the right to the policy for the life of Wm. S. Warwick, which could only be defeated by his default. This right became vested when the advance premium was paid, and was a right to the insurance not merely for one year but for the life of Wm. S. Warwick. A new contract every year was not necessary to give the right; but only the annual payment of the premium was necessary to prevent the divesting of the right. The annual payments, and giving receipts therefor, were not new contracts, but only the performance of a subsisting contract. The contract being made strictly within Virginia, with an agent residing there, and who was to continue to reside there as long as any stipulation of the contract was unperformed—an agent with

whom the contract was to be performed, and to whom the premiums were to be paid, in Virginia, as has been shown, it seems to me that this case does not fall within the rule as applied, or within the reason of it, as explained and illustrated by the judges in any of the numerous cases cited by the learned counsel. In all those cases the contract was to be performed in the enemy's country. Here the performance is strictly restricted by the contract itself, according to its intent and legal effect, and by the design and policy of the law, by the authority of which it was made, to the limits of Virginia. In those cases, and which was particularly relied upon by Judge Story in the case of the *Rapid*, "they had no power to sue in the public courts of the enemy's nation." Upon this contract they could sue or be sued in the public courts of Virginia, even pending the war.

Griswold vs. Waddington, 16 Johns., is a leading case relied upon by the learned counsel for the company, and particularly the following passage in the very elaborate and learned opinion of the chancellor: "Here then," the chancellor observes, "we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all *interchange or transfer, or removal of property, to all negotiation and contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat.*" The chancellor has given us here a compend of all the cases, to which this doctrine reaches, but unfortunately for the plaintiffs in error they cannot bring their case within the category. In the performance of this contract, by the assured, it was not necessary that there should be any "interchange," "transfer" or "removal" of property from this State into the enemy's country: nor did its performance require any "communication," "locomotive intercourse." "negotiation and contracts," between him and the plaintiffs in error, or any alien enemy, and a state of "utter occlusion" to any intercourse but one of open hostility, to any meeting but in actual combat, (if there could have been such a meeting between a man near seventy years of age and a New York corporation,) was not incompatible with the execution of this contract. It does not appear that there was before the war, in the making and execution of it, any intercourse or correspondence of any sort, between the assured and the officers of the company in New York. Certainly none was necessary. It is most probable that they were not known to each other. And if the con-

tract could be made and performed before the war, without any intercourse between them, there is no reason why it should not be done during the war.

If the law had been framed by the Legislature of Virginia, with a special reference to a state of war between the States, its adaptation could scarcely have been more complete. The possibility of such a state of war may not have been, and probably was not, in the mind of the legislature, when they enacted this law. But as it was the design of the Legislature to protect the State and her citizens against abuses and impositions, by these foreign insurance companies, who were not amenable to her laws or subject to her jurisdiction, in imposing conditions upon these companies, for the privilege of operating in this State, sufficient to give the desired security in time of peace, they were necessarily comprehensive enough to embrace a state of war.

And to this end, in framing the law, whether for a state of peace or war, it was necessary to make the operations of the companies within the State strictly local and subject to the jurisdiction of the State, and completely independent of any foreign jurisdiction, in the making, performance and enforcement of their contracts in this State. This was evidently the leading design of the Legislature in the law which was framed for the purpose. Our difference is not as to the principle, but as to its application. In the numerous cases reviewed by the chancellor in that leading case, I am under the impression that the principle "that war dissolves the contract" is not applied, in a single instance, to a contract made and executed by one of the parties, in whole or in part, before the war; and where the execution of the contract on his part was to be completed before he was entitled to any performance of the other party, and had been partly performed, or where the dissolution of a contract made before the war would work a forfeiture. Such an application to the rule would be unreasonable, arbitrary and immoral. The parties in entering into the contract before the war did nothing criminal or unlawful, that they, or either of them, should be liable to the punishment of a forfeiture of their contract. Not so where the contract is made during the war. In that case it is unlawful and criminal, and therefore void. And this, it seems to me, is the proper distinction. Where the contract is made before the war, but not executed by either party, and the carrying it into execution would involve a violation of the duty of the parties respectively to their country, in the new relations which the war

has created; in that case its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved; and this not to the prejudice of the parties, or either of them, but, for their presumed convenience and benefit, to be absolved from the obligation of a contract, which, in the changed relations of their countries, cannot be carried into execution. On the other hand, if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties; and it cannot be carried into execution, consistently with the duty of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved or suspended.

In the very case we are commenting on, the contract which was the subject of the suit was made during the war between alien enemies; and there is not, I think, a sentence in the opinion of the chancellor, or in the cases he reviews, in conflict with the distinction I have taken. On p. 471, he cites the case of *ex parte* Boussmaker (13, Vesey 71) which supports it. He says, the Lord Chancellor having had occasion to notice this subject, observed "that a debt arising from a contract with an alien enemy, could not possibly stand, for the contract would be void. But if the two nations were at peace at the date of the contract, it being originally good, upon the return of peace the right to sue would survive." Chancellor Kent, commenting on this decision of Lord Chancellor Erskine, says: "The chancellor here very clearly and accurately marks the distinction between debts contracted before and after the commencement of the war, and he holds the latter to be absolutely void." And in the latter case of *Buchanan vs. Curry*, 19 Johns., when this elaborate review of the cases on this subject was fresh in the Chancellor's memory, he enforced an executory contract, made and partly executed before the war, between citizens of the two countries respectively, which afterwards became involved in war. The performance of the contract was completed *pendente bello* by one of the parties with the agent of the other, who resided in the same country with the former, and the performance with the agent was held good and binding on the other party, who was an alien enemy residing in the enemy's country. But the chancellor said, "If such a contract had been entered into during the war,

it would have been illegal and void." And again: "It is not unlawful to pay debts or perform contracts to alien enemies if the payment be made, or the duty be performed, in one country."

This is a much stronger case than that. In that there was nothing in the contract or law to limit the performance to the State or to the local agent. In this there is. In that there would have been no forfeiture or serious loss to the party by dissolving the contract. In this there would be a cruel forfeiture to one party, and no loss, but great gain, to the other. In that case the act was done in discharge of an obligation which might have been suspended without loss; in this, in the performance of a condition to save a forfeiture. In that case a party could not enforce his contract by suit *pendente bello*; in this he could. It was held in that case that "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transported so as to aid or strengthen our enemies. The crime consists in *exporting* the money or other property, or placing it in the power of the enemy—not in delivering it to an alien enemy or his agent residing here, under the control of our Government." The principle of that case is not in conflict with cases relied upon by the company's counsel, but clearly takes this case out of the rule applied in those cases; and the decision, it seems to me, is a complete refutation of the argument of plaintiff's counsel, that the war was a revocation of the agency in this case, a point upon which much stress was laid, and which I will now consider further. In *Clarke vs. Moony*, 10 Johns., Ch. J. Kent says: "It is even held if aliens are ordered away in consequence of the war, they are still entitled to leave a power of attorney and to collect their debts by suit." In *King vs. Hanson*, 4 Call., p. 259, Hanson, a native of England, came to Petersburg several years before the war of the Revolution. After the declaration of independence, he refused to take the oath of allegiance to Virginia, and returned to England. Before leaving, he appointed Atkinson & Taylor his attorneys in fact, to make sale of his house and lot in Petersburg. His attorneys make sale of it in 1778 for £1,000, for which they took the bond of the purchaser, payable on demand. After the war, Hanson returned and brought suit on the bond given to his agents for the purchase money. And this Court affirmed the judgment of the Court below, so far as it gave validity to the execution of the power by the agents, and enforced the bond with interest. The only ground upon which interest could have been allowed was, that the creditor had an agent here to whom payment could have been made. In the case of *Mouseaux vs.*

Urquhart, 19 Louisiana R., p. 485, it was held that the agency was not "dissolved or even suspended by the occurrence of the late war." In *Denniston vs. Imbrue*, 3 Wash. Cir. Repts., p. 403, the Court say "the last question respects interest during the war. We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not abate." The debtor might have paid his debt, either to the creditor, or his agent in this country, without the danger of violating his duty, or the laws of the land?" This case re-affirms the principle decided by the same Court in *Conn vs. Penn*, 1 Peters C. Rep., 496. The principle of these cases is settled by the highest court in the land, in the recent case of *Ward vs. Smith*, 7 Wall, p. 452. Mr. J. Field, delivering the opinion of the Court, says: "The objection that the bonds did not draw interest pending the civil war is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of Union forces and the bonds were there payable." (The creditor lived within the Confederate lines.) "When an agent appointed to receive the money resides in the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his principal. Nor can the rule apply when one of several joint debtors resides in the same country with the creditor, or with the known agent of the creditor."

These cases, and others which might be cited to the same effect, are not limited in their application to contracts wholly executed. And I am unable to perceive why it should not be applicable to our case, as well as to an executed contract. The only acts to be done by the assured were to pay money to the agent, at stated periods; and the only thing to be done by the company, through their agent, was to give a receipt for the money so paid, until after the death of Wm. S. Warwick. And we have seen that even in that event it was not necessary for the assured to go out of the State to enforce his contract against the insurers, for the policy, even by suit. Now, it seems to me that if there is any difference between this case and an executed contract it is in favor of this case, for these payments were not necessary to be made in discharge of debt, which could be done, and perhaps as well done, after the war, but they were necessary to be done in the performance of a condition to prevent a forfeiture, and the payments were

made at the place where, and the agent to whom. the *contract* required them to be made.

As to the form of the receipt, and that it should be signed by an officer of the company, that was prescribed by the company as the kind of evidence which it required of the payments. It could not change the law of the contract, which authorized payment to be made to the agent, and I think I have shown was not so intended. The obligation of the assured, by his contract, was to pay to the agent, and this requisition was not in conflict with that obligation. To say that the company could withhold these printed receipts on the day of payment would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the premiums he had paid; a conclusion against which the moral sense of mankind would revolt. I hold, then, if on the day and place when and where payment was to be made the assured offered to pay to the agent, who had not been provided with the printed receipts, the company will be presumed to have waived that requisition, and a payment to the agent without them would be good, and a sufficient compliance with the contract.

But it is contended that by the letter of May 30th, 1861, the agency was revoked. I do not think so. On the contrary, it evidently recognizes a continuing agency; it authorizes the agent to adjust difficulties, as to policies in a certain way, and requests, "if this does not meet your views let us know what you would advise." If the instruction must be construed that the premium should be paid in New York city, and not in Richmond, I think it is clear that they had no right under the contract to impose such a condition. And we find that in their next letter they say, "must be paid here, or by draft on this city;" again they say "we wrote you on the 30th of May last," &c.; "renewals to be paid here, or by draft on this city." And thus their agent seems to have understood their letter of the 30th of May. For he received payment of the premium on the 23d of July, 1861, and on the same day wrote to them to send the printed receipt. And again, on the 5th of August following, he wrote to them, "I wrote you on the 23d ult., requesting you to send me the company's printed receipt for Mr. Corbin Warwick's premium on policy No. 4,758, and have not heard from you; as soon as I get the receipt I will make the remittance to you." Whilst this company had no authority under the contract to change the place of payment, they

had undoubtedly the right to refuse payment in Confederate money, and to require it to be made by draft on New York, or in New York funds. This their agent was prepared to do. But in their letter of the 6th of August, although they acknowledge that in their letter of May 30th they had authorized the payment of the premium to be made by draft on New York, they refused or failed to enclose the printed receipt. By neglecting or refusing to send the printed receipt to their agent, as requested, they failed to receive the draft, which would have been remitted to them upon its receipt. And this being their last communication to him during the war, he did not remit to them the draft, but held it until probably 1863, when it was taken from him under the sequestration act. It was the implied refusal of the company, therefore, to receive payment from their agent, in the mode prescribed by themselves, which prevented the remittance being made. And if it is lost to them they have nobody to blame but themselves. It was certainly not the fault of the assured, who had honestly paid it in the kind of funds which they required, and it would be unjust to require him to pay it again. In all their correspondence with their agent I do not find an intimation of a purpose to revoke his agency; and under the act of Assembly, which is to be read as a part of their contract, they could not until they appointed another agent in his place. Were they relieved from this obligation by the war? Or could their failure to have an agent here to receive payment of the premiums release them from the obligations of the policy, or entitled them to a forfeiture? It seems to me that both these questions must be answered in the negative, and that they could not avail themselves of their own disability for such a purpose. But they are questions which do not arise in this case, inasmuch as there had been no revocation of the agency of Macmurdo. In their letters they express a disposition to act liberally towards their Southern policy holders. In this they may have been sincere. But their failure to send a printed receipt to their agent when requested, to enable him to remit to them a check upon New York, as they required, in payment of the premium, which he informed them had been received, does not show a disposition to afford any facility to the assured to fulfil the condition of his policy. If the receipt had been sent and lost, they could not have sustained any loss by its miscarriage. But the probability is it would have reached its destination, as did their letters both ways, and that they would have received a draft from their faithful agent, on New York for the premium. It is impossible to

shut our eyes to the fact that the company was largely interested in defeating these policies; and considerations of that sort may have had more influence upon their conduct than a desire to promote the interest of their policy holders. I am well satisfied that in this case they might have received the premiums from the assured in New York funds, if they had been very desirous to receive them. At any rate their agent, in receiving payment of the premium in 1861, in a draft on New York, did not violate his instructions, and in refusing to receive that for 1862 at Richmond, if he acted under instructions, they were instructions which the company had no right to give. I am therefore of opinion to affirm the judgment.

U. S. CIRCUIT COURT, DISTRICT OF KANSAS.

MAY TERM, 1871.

TERRY
vs.
 LIFE INSURANCE CO.* }

First. Insanity on the part of the assured, which irresistibly impelled him to take his own life, or existing to such an extent as to render him incapable of forming a rational judgment with respect to the act of self-destruction, will so far excuse him as to render the company liable, notwithstanding the policy contains a condition avoiding liability thereon, in case the assured shall "die by his own hand."

Second. The burden of proof to establish the insanity is, in such cases, upon the plaintiff, by whom it is alleged.

Third. There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity.

LIFE INSURANCE—SELF DESTRUCTION—INSANITY.

MILLER and DILLON, JJ.

This is an action on a life insurance policy issued by the defendant to the husband of the plaintiff. The policy contained a condition avoiding liability thereon in case the assured shall "die by his own hand." Answer: that the assured died from poison, which he took for the purpose of destroying his life. Replication: that he was insane at the time and with respect to the act in question. Trial by jury, before Mr. Justice Miller, and Dillon, Circuit Judge.

*Mutual Life Ins. Co., of New York. From advance sheets of Dillon's U. S. Circuit Court Reports. Decision rendered May 26th, 1871.

The fact that the deceased died from poison, self-administered, was admitted on the trial, and the only question was in respect to the alleged insanity. The testimony showed that the deceased had been in great trouble in consequence of rumors respecting his wife's fidelity; that he was in a highly excited and distressed state of mind; that in communicating his suspicions to friends he would at times break out in explosions of laughter without apparent cause; that he purchased arsenic, stating that he wished to kill mice, but inquired whether there was enough to kill a man. Some medical gentlemen gave their opinion to the jury that he was insane. There was no evidence offered by either party touching the conduct of the wife, or the ground or reasonableness of the suspicions of the deceased as to her character.

Mr. Nevison, for the plaintiff, contended for the doctrine laid down in *Eastabrook vs. Ins. Co.*, 54 Maine, 224; *Breasted vs. Ins. Co.*, 4 Seld., 299; S. C., 4 Hill, 73; 1 Phillips Ins., 503; *State vs. Felter*, 25 Iowa, 67.

Mr. Shannon, for the defendant, referred to *Dean vs. Ins. Co.*, 4 Allen, 96, and asked the court to instruct accordingly.

After consideration, the court by the presiding justice, charged the jury as follows:

Mr. Justice MILLER.—It being agreed that deceased destroyed his life by taking poison, it is claimed by defendants that "he died by his own hand," within the meaning of the policy, and that they are therefore not liable. This is so far true that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the poison, as will relieve the act of taking his own life from the effect, which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from

insanity ; and if you believe, from the evidence, that the deceased, although excited or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.

The jury found for the plaintiff, and there was judgment accordingly.

[NOTE.—Under a policy with a condition making it void in case the assured shall die by his own hands, the company is liable if the self-destruction shall happen as a direct consequence of the insanity of the person insured. *Breasted vs. The Far. Loan and Trust Co.*, 4 Hill, (N. Y.), 73, 1843; S. C., 8 N. Y. (4 Seld.), 299, 1853; *Eastbrook vs. Union Mut. etc. Co.*, 54 Maine, 224, 1866; *Hartman vs. Keystone Ins. Co.*, 21 Pa., 86, 466, 1853 (poisoning by taking arsenic). As to the *degree and nature* of the insanity necessary to make the company liable, when the policy contains such a condition, the cases are conflicting. See, in addition to the above, *Dean vs. Am. Mut. Life Ins. Co.*, 4 Allen, 96, 1862; S. C. with note, 1 Big. Ins. Rep., 195; followed *Cooper vs. Mass.*, etc., *Ins. Co.*, 102, Mass., 227, 1869; *Nimick vs. Ins. Co.* (U. S. Circuit Court, West. Dist. Pa., McKennan, J., 1870), 1 Big. Ins. Rep., 639; *St. Louis Ins. Co. vs. Graves* (Court of Appeals, Kentucky, 1869); *ib.*, 736, as to effect of *moral* insanity. The leading British decisions on the subject are *Borradaile vs. Hunter*, 5 Man. & Gr., 639, 1843; *Clift vs. Schwabe*, 3 Man. & Gr., 437, 1846; 2 Car. & Kir., 134; *Defaur vs. Ins. Co.*, 25 Beav., 602, 1853; *Horn vs. Ins. Co.*, 7 Jour., (N. S.) 673; *White vs. British, etc., Ass. Co.*, 7 Law Rep., Eq. Cases, 394.

Sanity of a person who commits suicide presumed. *Arguendo*, per Williams, C. J., in *St. Louis Ins. Co. vs. Graves*, *supra*; *contra*, Robertson, J., *ib.*

The court examined the foregoing authorities before adopting the charge to the jury in the foregoing case.—*Rep.*]

SUPREME COURT OF ERRORS, CONNECTICUT.

FEBRUARY TERM, 1871.

FRANKLIN J. COUCH AND WIFE }
 vs. }
 THE CITY FIRE INS. CO.* }

The provision requiring consent in case of double insurance to be indorsed upon the policy by the hand of the Secretary was inserted, by the Legislature, in the charter of the company for the purpose of preventing the company from insuring property otherwise than as provided therein.

This requirement of the charter could not be waived by the company or departed from in any essential particular, nor was it competent for the plaintiffs to prove the consent of the company by other evidence than such indorsement.

PARK, J.

Whatever may be thought of most of the questions involved in this case, we think there is one which is clearly fatal to the

* Decision rendered September 30th, 1871.

plaintiffs' claim, and we shall therefore confine our attention to that question alone.

The twelfth section of the charter of the defendants provides that, "If there shall be any other insurance upon the whole or any part of the property insured, by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy, under the hand of the secretary." There was such double insurance in this case, at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter, therefore, declares the policy void; and it is void, unless the twelfth section is of such a character that its provisions can be waived by the defendants.

If this provision was made solely for the benefit of the defendants, there might be force in the claim of the plaintiffs, that it could be waived, on the ground that what is exclusively for the benefit of a person, either natural or artificial, is for him to enjoy or not, as he pleases; and if he chooses to forego the benefit, he has a right to do so, as no one but him is interested in the matter. But we think that the defendants are not solely interested in this provision of the charter. It was made to guard against the danger of over-insurance. It is well known that over-insurance encourages incendiary fires; and insurers are, therefore, extremely careful not to insure property to the full amount of its value, but leave the assured to be himself the insurer of a part thereof, that he may have a common interest with them in the preservation of the property. The eleventh section of the defendant's charter, as well as the one under consideration, shows what solicitude the Legislature entertained upon this subject, and the great care they exercised to prevent this evil.

Such being the tendency of over insurance, it is manifest that it endangers not only the welfare of insurers but the welfare of all their policy holders, who have a deep interest in their solvency in case of loss by fire. Insurance companies insure property to an amount many times their capital, and it may easily happen that a few fraudulent incendiary fires scattered over the country should involve them and their policy holders in heavy and perhaps ruinous losses. But the evil of over insurance does not stop here. Everywhere insured property is mingled indiscriminately with property not insured. The burning of the insured property burns the other also, and every year

vast amounts of property not insured go to destruction in consequence of the over-insurance of property in its neighborhood. Surely the welfare of such owners should be considered by legislatures, and provision should be made for them when corporations like these are created. It is to be considered, also, that the welfare of the State, which has an interest in all the property of the State, requires that this should be done.

One great source of this evil is the insurance of the same property by different companies, when each company is not aware of the act of the other. To prevent this evil as far as may be, in the present case, we think the legislature inserted the 12th section in the defendant's charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal endorsement upon the policy by the hand of their secretary, which could not be made without consideration and deliberation on the one hand and certainty of the fact on the other. (*Hale vs. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169.) This difference is all important in a case like this; and, indeed, if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter, for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance, or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition. It would be urged that the plaintiff was ignorant of the provisions of the charter, and if the defendants intended to make it a part of the contract they would have informed the plaintiff by inserting it in the policy. Thus, in order to make it a part of the contract, it would have to be inserted in the policy of insurance, whether it was embodied in the charter or not; and if inserted in the policy it would have

all the effect that the charter could give it if the legislature intended no more by this provision than mere consent. We think, therefore, that the legislature had more than this in view, and intended to limit the power of the company in the matter.

If, then, the twelfth section must have such construction, manifestly it could not be waived by the defendants, or departed from in any essential particular; for, in the language of Chief Justice Marshall, in the case of *Head vs. Providence Ins. Co.*, 2 Cranch, 127, "the act of incorporation is an enabling act, it gives the corporation all the power it possesses; it enables them to contract, and where it prescribes to them a form of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Phillips on Insurance, vol. 1, page 9, says, an incorporated insurance company "is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made of it, to derive all its powers from that act and to be capable of exercising them only in the manner which that act authorizes." See also *New London vs. Brainard*, 22 Conn., 552; *Occum Co. vs. Sprague Man. Co.*, 34 Conn., 529; *Hood vs. New York and New Haven Railroad Co.*, 22 Conn., 502.

We think, therefore, that it was not competent for the plaintiffs to prove the consent of the defendants to the double insurance on the plaintiff's property by any other evidence than an indorsement of such consent on the policy, under the hand of the secretary of the company, and that the jury should have been so instructed.

We advise the Superior Court to grant a new trial.

In this opinion the other judges concurred.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1870.

On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts.

THE NEW ENGLAND MUT. MARINE INS. CO., App'rs. }
 vs. }
 THOMAS DUNHAM.* }

Mr. Justice BRADLEY delivered the opinion of the Court.

The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

First. The *locus*, or territory, of maritime jurisdiction, where *torts* must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide.

Secondly. As to *contracts*, the true criterion whether they are within the admiralty and maritime jurisdiction, is their nature and subject matter, as whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

In view of these principles it was held that the contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts.

The case of *Delovio vs. Boit*, 2 Gallison, 398, affirmed.

Practice.—Held, that this court has jurisdiction, under the act of 1802, of a certificate of division of opinion between the associate justice of the Supreme court and the circuit judge, together holding the Circuit Court, as well as between either of said judges and the district judge.

This case comes before us on a certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts on appeal from the District Court of that district. When this division of opinion occurred the Circuit Court was being held by the associate justice of this court, allotted to the first circuit, and the circuit judge of that circuit, sitting together. It becomes necessary, therefore, in the first place, to decide whether a difference of opinion between these judges, sitting in the Circuit Court, may be certified to this court under the act of April 29, 1802.—(2 Stat. at Large, 159.) The language of the act is broad enough to include the case. It is as follows: "Whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the

*Decision rendered March 27th, 1871.

point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided." But it has been suggested that, although the case is included in the terms of the act, it is not within its meaning, because the constitution of the circuit has been changed by the recent act creating circuit judges, passed April 10, 1869. There is nothing in this act which alters the powers of the court, or obviates the difficulty which a certificate of division was intended to meet. That difficulty arose from the fact that the court was constituted of two judges, between whom a difference of opinion would be likely often to occur, and thus block the wheels of justice. Other things being equal, a division of opinion is far more probable between *two* persons than is an equal division between any other even number of persons. This renders it desirable, when a court consists of the former number, to have some method provided for overcoming the intrinsic difficulty. Such a method was provided by the act of 1802, to meet the then constitution of the court, which consisted of a justice of the Supreme Court and the district judge. The act of 1869 has created a new circuit judge, it is true, but he is invested with precisely the same power and jurisdiction, in his circuit, as the justice of the Supreme Court has therein, whilst the powers of the latter, as judge of the circuit, are the same as before, and the court is to be held either by one of them or the district judge, or any two of the three. Thus the same necessity exists as before for the power to certify questions to the Supreme Court. As the mischief remains the same, and the terms of the act of 1802 are general and adequate to continue the remedy, such a construction of it as will have that effect seems to be fairly warranted.—(See *Exp. Zellner*, 9 Wall., 244.)

We, therefore, conclude that the case is properly brought before us by certificate.

The case, as thus presented, is as follows: A libel *in personam* was filed in the District Court for the District of Massachusetts, by Dunham against the New England Mutual Marine Insurance Company, on a policy of insurance dated at Boston on the 2d day of March, 1863, whereby the insurance company, a corporation of Massachusetts, agreed to insure Dunham, the libellant, a citizen of New York, in the sum of \$10,000, for whom it might

concern, on a vessel called the Albina, for one year, against the perils of the seas and other perils in the policy mentioned; and the libellant alleged that within the year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libellant had expended large sums of money in repairing the same, of which he claimed payment of the insurance company; and the question is whether the District Court, sitting in admiralty, has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

This precise question has never been decided by this court; but, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the District Courts, in admiralty and maritime cases, has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the judiciary act passed at its first session, 24th of September, 1789, established the District Courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made co-extensive with the constitutional gift of judicial power on this subject.

Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe, for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law; and embracing, altogether, a system of regulations embodied

and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other State. In all other countries, bordering on the Mediterranean or the Atlantic, the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments, and partly from assumptions of public policy, the common law courts succeed in establishing the general rule that the jurisdiction of the admiralty was confined to the *high seas* and entirely excluded from transactions arising on waters within the body of a country, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney, "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for

which admiralty and maritime jurisdiction was granted to the Federal Government."—(1 Black, 527.) "Courts of admiralty," says the same judge in another case, "have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."—(12 How., 454.)

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the *locus* or territory of maritime jurisdiction; that is, the place or territory where the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide. "Are we bound to say," says Justice Wayne, delivering the opinion of the court in *Waring vs. Clarke*, 5 How., 462, "Are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that *sea* always means *high sea or main sea*? * *

Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? * * We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The judiciary act expressly extended it to seizures, under laws of impost, navigation or trade of the United States, where made on waters

navigable from the sea by vessels of ten or more tons burthen, as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of the *Genesee Chief*, decided in 1861, (12 Howard, 443), it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney, "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."—(12 How., 457.) This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this Court.

Secondly, as to *contracts*, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In *Menetone vs. Gibbons*, 3 Term Rep., 269, Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends upon the *subject matter*." Had these views actuated the common law courts at an

earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of the *N. J. Navigation Company vs. Merchants' Bank*, 6 Howard, 344, which was a libel *in personam* against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer *Lexington* on Long Island Sound, Justice Nelson, delivering the opinion of the court, says: "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. * * On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." (6 How., 392.) [The last distinction based on tide, as we have seen, has since been abrogated.] Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship carpenters and material men on contracts for repairs, materials, and supplies, and by pilots for pilotage; in none of which would it have been allowed to the admiralty courts in England. (See cases cited by Justice Nelson, 6 How., 390, 391.) In the subsequent case of *Morewood vs. Enequist*, decided in 1859 (23 How., 493), which was a case of charter party and affreightment, Justice Grier, who had dissented in the case of the *Lexington*, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the term, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" (*Morewood vs. Enequist*, 23 How., 493). He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of the *Lex-*

ington, and that they had then decided "that charter parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*." The case of the *People's Ferry Co. vs. Beers*, (20 How., 401), being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is *not a maritime contract* ;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court ; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of the *Moses Taylor* (4 Wall., 411), it was decided that a contract to carry passengers by sea, as well as a contract to carry goods, was a maritime contract, and cognizable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of the *Belfast*, (7 Wall., 624,) it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were but the subject of inter-state commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality." (7 Wall, 637.)

It thus appears that in each case the decision of the court and the reasoning on which it was founded, have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted ; if it was not, the jurisdiction was denied. And whether maritime or not maritime, depended, not on the place where the contract was made, but on the *subject matter* of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various district and circuit courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

It is objected that it is not a maritime contract because it is made on the land, and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk—in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea; the contract of the other against loss from all other dangers. Of course, these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are, or are not, maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other, maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the

questions that can arise in maritime commerce—jettison, abandonment, average, salvage, capture, prize, bottomry, etc.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed, creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce, by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon; and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants, appointed by the Lord Mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily decide those causes, until of late years divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer, by suits commenced in her majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the Court of Admiralty, in prohibiting its cognizance of policies of insurance half a century before,* the latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime, relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then,

* 4 Inst., 139.

as remarked by Sir W. D. Evans, "The inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as a matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent."—(Evans' Statutes, vol 2, p. 226, 3d edition.) The contrivances to which Lord Mansfield resorted, to remedy, in a measure, these difficulties, are stated by Mr. Justice Parke in the introduction to his work on insurance.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of the loss naturally suggested a provisional division of risk; first, amongst those engaged in the same enterprise; and next, amongst associations of ship owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and, in Italy and Portugal, was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur.—(2 Pardes. Lois Mar., 369; 6 do., 303.) The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guarantee against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century*, and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than

essus, Lois Maritimes, vol. 2, pp. 335, 370; vol. 4, p. 566; vol. 5, pp. 331, 493.

the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the ordinances of Barcelona, A.D. 1435; of Venice, A.D. 1468; of Florence, A.D. 1523; of Antwerp, A.D. 1537, etc.—(Pardessus, vol. 5, pp. 493, 65; vol. 4, pp. 598, 37.) Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV, issued in 1681, it forms the subject of one of the principal titles.—(Lib. 3, title 6.) As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts. (See Benedict's admiralty, sec. 294, ed. 1870). The French ordinance of 1681 touching the marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea." (Sea Laws, 256.) The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called *The Consulate of the Sea*, printed at Barcelona in the year 1592." (Roccus on Insurance, Note 80.)

It is also clear that, originally, the French admiralty had jurisdiction of this as well as of other maritime contracts. It is

expressly included in the commissions of the Admiral. (Benedict, sec. 48). Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the court of admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom." (2 Bro. Civ. and Adm. Law, 82.) But the intolerance of the common law courts prohibited the exercise of it. In the early case of *Crane vs. Bell*, 38 Hen. 8, (1546), a prohibition was granted for this purpose. (See 4 Co. Inst., 139). Mr. Browne says, very pertinently: "What is the *rationale*, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings." (2 Browne 88).

Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the revolution, which may be fairly supposed to have been in the minds of the convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them. (Benedict, chapter IX).

The discussions that have taken place in the district and circuit courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of *Delovio vs. Boit*, 2 Gallison, 398, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit. (See 2 Curtis, 332, 333). In 1842 Justice Story, in reaffirming his first judgment, says, that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know. (2 Story's Rep., 183). Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the circuit court will be, that the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain the libel in this case.

STATUTE LAWS.

MASSACHUSETTS.

AN ACT Relating to Insurance Companies.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:

§ 1. It shall be the duty of the Insurance Commissioner, by himself or his deputy, at least once in three years, and whenever he deems it necessary for the protection of policy holders, to visit each insurance company incorporated in this Commonwealth and thoroughly examine its financial condition and ability to fulfil its obligations, and ascertain whether it has complied with all the provisions of law applicable to the company and its transactions.

§ 2. He shall in like manner, whenever he deems it necessary for the protection of policy holders in this Commonwealth, visit and examine, as aforesaid, any insurance company not incorporated in this State and doing business by agencies therein. He may employ such assistants as are necessary in making the examination; and all the expenses of an examination, without the Commonwealth, shall be borne by the company examined.

§ 3. For the purposes aforesaid, the Commissioner or his deputy shall have free access to all the books and papers of any insurance company doing business in this Commonwealth, and may examine, under oath, its officers or agents, relative to its business and condition. If any company not incorporated in this State, its officers or agents, refuse to submit to such examination, or to comply with any provisions of this act in relation thereto, the authority of such company to do business in this Commonwealth shall cease.

§ 4. Whenever he deems it expedient, the Commissioner shall publish in the newspaper in which the general laws are published, the result of any examination made as aforesaid. If

it appears to the Commissioner, upon such examination, that any company not incorporated in this State is in an unsound condition, or if the company refuse to submit to an examination as aforesaid, he shall revoke all certificates of authority granted in behalf of such company or its agents, and shall cause notice thereof to be published in the newspaper aforesaid, and all new business thereafter done by the company or its agents, in this Commonwealth, shall be deemed to be done in violation of law.

§ 5. No insurance company or association, incorporated or formed in this Commonwealth, shall issue policies until, upon examination by the Insurance Commissioner or his deputy, it is found to have complied with the laws thereof; nor until a certificate is obtained from said Commissioner, setting forth such fact and authorizing such company to issue policies. Every such company or association shall pay into the treasury of the Commonwealth, for the examination required by this section, the sum of thirty dollars.

§ 6. For such additional assistance, as the Insurance Commissioner may find necessary in the discharge of the duties imposed by this act and by existing laws, he may appoint, with the approval of the Governor and Council, and subject to removal with their consent, a deputy commissioner, who shall receive an annual salary of three thousand dollars; and he may also employ such additional clerical assistance as may be required in connection with the fire and marine department, at an expenditure not exceeding fifteen hundred dollars per annum.

§ 7. The provisions of all general laws relating to the taxation of insurance companies, incorporated in this Commonwealth, are hereby extended to all companies, associations and individuals, formed or associated, and engaged in any kind of insurance business therein, involving indemnity or guarantee against fire and marine losses, or losses by lightning or otherwise, whether incorporated or not; and such companies, associations and individuals, and their officers and agents, shall be subject to the same duties, obligations and penalties; and the Insurance Commissioner shall have the same powers and duties in relation thereto, as are or may hereafter be provided by the general laws in regard to insurance companies incorporated in this State.

§ Whoever acts or aids in any manner in negotiating contracts of re-insurance, or placing such risks, or effecting such insurance, for any party other than himself, receiving compensation

therefor, shall be deemed to be an insurance broker, within the meaning of section one, of chapter ninety-three of the acts of the year 1869.

§ 9. The provisions of section eight, of chapter fifty-eight, of the General Statutes are hereby so amended that the report therein required to be made to the Secretary of the Commonwealth, relative to violations of law by an insurance company, its officers or agents, may be made directly to the Attorney General.

§ 10. The provisions of section seventy, of chapter fifty-eight, of the General Statutes, relating to taxes, penalties and obligations, imposed by the laws of any other state upon insurance companies incorporated or organized under the laws of this State, and transacting business in such other State, or upon the agents of such insurance companies, shall be held to include fees charged for certificates of license issued to insurance agents or brokers.

§ 11. This act shall take effect upon its passage.

Approved May 17, 1871.

MISSOURI.

AN ACT to repeal section ten, of Chapter ninety, General Statutes of Missouri, being section five, of article four, of Wagner's Missouri Statutes.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Section ten, of chapter ninety, General Statutes of Missouri, being section five of article four, of Wagner's Missouri Statutes, is hereby repealed.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved March 20, 1871.

The following is the section repealed :

"SECTION 10. There shall be levied and collected by the clerk so issuing such licenses, including licenses to life insurance com-

panies and their agents, in all counties having a population of one hundred and fifty thousand, the sum of one hundred dollars for State purposes, and the sum of two hundred dollars for county purposes, on each and every license so issued; and in all counties having a less population than one hundred and fifty thousand, there shall be levied and collected on each and every license so issued the sum of thirty dollars for State purposes and a like sum for county purposes; and such license shall be exempt from all other taxation; and when any company has more than one agent in any county having a population of one hundred and fifty thousand, such additional agent or agents shall each file a copy of their commission or power of attorney with the county clerk, and shall each pay a license for acting as such agent the sum of twenty-five dollars for State, and fifty dollars for county purposes."

MISCELLANEOUS.

WE have associated Luther H. Potter, Esq., with us in the editorial and business management of the JOURNAL. Mr. Potter is a practical insurance man, for several years connected with a prominent life company of New York, and will prove a valuable acquisition to the JOURNAL.

WE owe an apology to our subscribers and friends for the great delay in the appearance of this our second number. In addition to the unavoidable difficulties attending the preparation of the first numbers of a magazine like the JOURNAL, we have been subjected to great disappointments and delay by the printer with whom we had contracted for printing, and have been compelled at last to reprint the whole edition. This trouble will not be likely again to occur. The next number is already in press, and will be out in a few days, and we shall soon be able to have the JOURNAL promptly in the hands of our subscribers by the first of each month.

BRADLEY VS. THE MUTUAL BENEFIT LIFE INSURANCE CO.—
WE are informed by R. D. Benedict, Esq., of New York city, that the report of the case of Bradley, *vs.* the Mutual Benefit Life Ins. Co., in the last number of the JOURNAL, contained a very serious error, and that the opinion of Judge Rapallo was the opinion of the court, and the opinion of Judge Grover the dissenting opinion, and not the opinion of the court, as we gave it. Mr. Benedict was the attorney for the plaintiff, and argued the case before the court. Our error arose from a misunderstanding of the transcript as sent us. We shall give the proper correction of the digest for this case in the next number. Mr. Benedict will accept our thanks for his correction.

CASES REPORTED.

The present number of the JOURNAL contains a full report in six insurance cases.

In *Baker vs. The Union Mutual Life Ins. Co.*, the digest of which was given in our last number, the court held that the husband may lawfully insure his life for the benefit of his wife; that, where the husband takes out a policy upon his life for the benefit of the wife and payable to her, and gives his own notes in payment of the premium, the contract is with the husband, and the conditions to which he assented qualify the policy; and that, even if the policy be regarded as having been procured by the wife, the husband is to be considered her agent; that the policy and notes given at the same time are parts of the same contract; and that the receipt of the first premium indorsed on the policy is but an admission, and liable to be contradicted.

In *The North American Fire Ins. Co. vs. Throop* the court holds that evidence is admissible to prove that the agent of the company, who wrote the application, knew of certain incumbrances not mentioned in the application; and that the act of the agent, in waiving conditions, is precisely the same as it would be, if an individual insurer was himself personally present and acting. The court also held that when the insurer was asked in the application if he had reason to believe his property was in danger from incendiaries, and he answered "No," it was no defense that sufficient information was given to put the agent of the company upon inquiry; also, that a witness had the right, on cross-examination, to look over the whole paper before answering whether the signature was his signature.

In *The Manhattan Life Ins. Co. vs. Warwick*, the court hold that a policy, issued in consideration of a premium in hand paid, and of a like sum to be paid annually, is one entire contract, and not a contract from year to year; that an indorsement upon a policy inconsistent with its terms and legal effect, or repugnant thereto, is void; that if the agent of the company, to whom payment of premiums is to be made, is not provided with the printed receipts required, the company will be presumed to have waived the requisition; that the breaking out of the war did not annul the contract or exonerate the company from its obligations under it, or operate as a revocation of the agency of an agent, appointed before the war. Judge Anderson, in his opinion, reflects some-

what severely upon the course pursued by the company towards its policy holders.

Mr. Justice Miller, in the U. S. Circuit Court, in the case of *Terry vs. The Mutual Life Ins. Co. of New York*, instructed the jury that insanity, on the part of the assured, which irresistibly impels him to take his own life, or renders him incapable of forming a rational judgment, with respect to the act of self-destruction, will so far excuse him as to render the company liable, notwithstanding a clause in the policy that it shall be void in case the assured shall "die by his own hand;" that the burden of proof to establish insanity is, in such cases, upon the party by whom it is alleged, and that there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity. The case has been taken to the U. S. Supreme Court on a writ of error.

In *Couch vs. The City Fire Ins. Co.* the charter prohibited double insurance, unless the consent of the company be indorsed upon the policy by the hand of the secretary. The court held that this provision could not be waived by the company, or evidence other than such indorsement be introduced to prove the consent of the company.

The United States Supreme Court, in *The New England Mutual Marine Ins. Co. vs. Dunham*, decide that the admiralty and maritime jurisdiction of the United States is not limited by the restraining statutes or judicial prohibitions of England, and that whether a contract is to be considered maritime or not maritime, depends upon the *subject matter* of the contract; also, that a difference in opinion between an associate justice of that court and the U. S. Circuit Judge, sitting together as the Circuit Court, may be certified to the Supreme Court under the act of April 29, 1802.

INSURANCE LEGISLATION.

Massachusetts.—This act relates to the duties of the commissioner, the employment and pay of his assistants, and the examinations, and taxes required of insurance companies and agents. The commissioner may appoint, subject to the approval of the Governor and council, a deputy, whose salary is not to exceed \$3000 per annum, and may employ clerical aid at an expense not to exceed \$1,500 per annum, and in making examinations of companies outside the State, he may employ such assistants as

are necessary. Companies of the State are to pay a fee of \$30 for an examination to do business. The expenses of examinations, made outside the State, are to be borne by the companies examined. It is made the duty of the Commissioner to visit each insurance company of the State, at least once in three years, and oftener if he considers it necessary, with a view to ascertain its financial condition, and its compliance with the laws; and he is to visit companies of other States, in like manner, whenever he shall deem it necessary. He may, at his discretion, publish the result of any examination, but if the company is found to be unsound or refuses to comply with the requirements of the law, he is required to revoke its certificate and publish notice of the same, and any business done after such notice is in violation of law. The general laws relating to taxation of home companies are to apply to all persons and companies of every kind doing business in the State. The reciprocal law in regard to taxes upon companies of other States is to include fees for certificates of license. Any person doing any insurance business for another person and receiving compensation therefor is to be held an insurance broker. Violation of the insurance laws are to be reported to the Attorney General.

Missouri.—This act repeals a very onerous and unjust statute, requiring a license fee from companies organized in other States of \$300 for each county having a population of over one hundred and fifty thousand inhabitants, and of sixty dollars for other counties.

EXCHANGES RECEIVED.

LEGAL.

Albany Law Journal; Bench and Bar; American Law Times; Law Times United States and State Reports; National Bankruptcy Register; Legal Intelligencer; Legal Gazette; Legal Opinion; Lancaster Bar; Chicago Legal News; Western Jurist; Pacific Law Reporter; London Law Times.

INSURANCE.

The Monitor; Spectator; Times; Western Insurance Review; Philadelphia Underwriter; Chronicle; Herald; New York Underwriter; Baltimore Underwriter; Avalanche.

THE editors and publishers of the *Albany Law Journal*, *Bench and Bar*, *Monitor*, *Spectator*, *Times* and *Western Insurance Review* will accept our thanks for files of these journals for the year.

BOOKS RECEIVED.

INSURANCE LAWS OF ILLINOIS, (Chapter 53a of Gross' Statutes of Illinois). E. L. & W. L. Gross, Springfield, Ill., 1871.

CINCINNATI SUPERIOR COURT REPORTS. Vol. 1. Numbers 1 to 8. Edited by Chas. P. Taft and Bellamy Storer, Jr., of the Cincinnati Bar. Robert Clark & Co., Cincinnati, 1871.

We are under obligations to Hon. Julius L. Clarke, Insurance Commissioner of Massachusetts, for a set of Massachusetts Insurance Reports and for the Insurance Laws of Massachusetts, consolidated and arranged by Insurance Commissioners Sanford and Clarke; also, to Hon. Joel M. Spencer, Insurance Commissioner of Rhode Island, for a set of Rhode Island Insurance Reports, and to Hon. Wyllys King, Superintendent of the Insurance Department of Missouri, for Insurance Reports of Missouri.

MEETING OF THE CHICAGO BAR.—On Monday last, at the High School Building, there was one of the largest meetings of the Chicago Bar ever held. William A. Porter, Judge of the Superior Court, was chosen chairman, and T. Ledy secretary. The members all seemed to be in dead earnest, and determined to do all in their power to restore the city to its former greatness, and place themselves in a position as soon as possible to earn a living for themselves and families by the practice of their profession. The subject of discussion was to determine what legislation was necessary in order to settle titles when the records had been burnt. The following resolutions were passed unanimously:

Resolved, That the Judges of the courts of Cook county, and the Judges of the United States Circuit and District Courts, be appointed a standing committee to consider of and devise such legislation as may be necessary to restore lost papers and records of all courts, public offices, settle titles to realty, and all kindred subjects.

Resolved, That said committee appoint any sub-committee they may deem desirable from the bar, to consider any designated matter, and report to the committee. And the members of the

bar each pledges himself to do any such sub-committee work required of him.

Resolved, That said standing committee do whatever they may deem desirable for the purpose of having schemes of legislation prepared, to be submitted to the Legislature, State and Federal, at the proper time.—*Chicago Legal News*.

THE *Legal Opinion* of Harrisburg, in commencing its second volume, comes out in a new form, under new management, and is greatly improved in appearance. It is now a handsome weekly journal of twelve pages.

THE *Chicago Legal News*, the *Chronicle* and the *Herald* were sufferers by the great fire. The *Legal News* did not loose an issue, and has already fully recovered in size, appearance, and in the value of its contents. The *Herald* appeared with only a brief delay, and the *Chronicle* has announced, in a circular to its subscribers, that it will reappear after a delay of two or three weeks to obtain new material.

THE Law Book establishment of E. B. Myers, of Chicago, one of the most extensive in the West, was entirely destroyed with the stock on hand. We notice that one San Francisco publishing house sent him a gift of \$500 worth of books, and that with the enterprise characteristic of Chicago, he is already re-established with a new and complete stock of law books.

WE are under obligations to Judge Dillon for advance sheets of his U. S. Circuit Court Reports containing the opinion in the case of *Terry vs. The Mutual Life Ins. Co.*, reported in our present number, and to Franklin Chamberlin, Esq., of Hartford, for his brief in the case of *Couch vs. The City Fire Ins. Co.*, also reported in this number,—Mr. Chamberlin was attorney for the defendant in the trial of the case.

AT the last session of the Connecticut Legislature the charter of the Charter Oak Life Insurance Company was amended so as to exempt from the claims of creditors, policies, the annual premiums on which do not exceed \$300, instead of \$150, the former limit.

CHIEF JUSTICE HOWE, of Wyoming, has resigned his office as judge in that Territory.

IN the old days when forgery was punished by death, an English judge, in passing sentence upon a convicted forger, remarked that he "hoped the prisoner would find that mercy in Heaven which a due regard to the paper currency of Great Britain made it necessary to deny him upon earth."

THE
INSURANCE LAW JOURNAL.

VOL. I.

NOVEMBER, 1871.

No. 3

DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

CERTIFICATE OF JUSTICE.

§ 58. FIRE—*Waiver by Agent*.—The testimony tended to show that the general agent waived the condition of the policy requiring a certificate from a justice of the peace nearest the place of the fire, and consented that it might be made by another justice. No instructions were given to the jury. *Held*, that it is to be presumed the jury found that such waiver was made, and that “in the absence of any instructions to the jury, the same force and effect is to be given to the verdict as would be given to it had the court instructed them and instructed them correctly, on the law applicable to all questions of fact involved in the issue.”

*Killips vs. The Putnam Fire Ins. Co.**

Rep'd Jour'l p. 169.

Wis. S. C.

* Decision Rendered December 11th, 1871. To appear in 26 Wis.

CONSTRUCTION.

§ 59. FIRE—*Practice*.—It was the duty of the court to give a construction to an obscure and uncertain instrument of writing, and “the failure to do so was error; but it is no ground for reversing the judgment, because it is clear that the jury must have put upon it a correct construction, such as the court should have given it, or they could not have found for the plaintiff.”

Ricker vs. Cutter, 8 Gray, 248.

*Germania Fire Ins. Co. vs. Curran, Adm’x.**

Rep’d Jour’l, p. 191.

Kas. S. C.

EVIDENCE.

§ 60. FIRE—*Admissions in Proofs of Loss*.—The insured, in his proofs of loss, stated that he had taken out a subsequent policy in another company. It was objected on trial that the subsequent insurance was not proved. *Held*, that “the deliberate statement of this policy in the proofs of loss dispensed with any other proof of it, and that the rule, that the proofs are no evidence in favor of the insured, does not preclude them from operating as admissions.”

New York Central Ins. Co. vs. Watson.†

Mich. S. C.

§ 61. FIRE—*Estoppel*.—In her examination by the attorney of the insurance company, soon after the loss, the plaintiff, under oath, stated that she had sold the property before the loss. *Held*, that this statement did not operate as an estoppel to prevent her from denying the sale of the property.

Germania Fire Ins. Co. vs. Curran, Adm’x.

—§ 59.

§ 62. FIRE—*Practice*.—“In the course of the trial plaintiff announced that he had closed his testimony, but before anything further had taken place asked and obtained

* Decision rendered May 15th, 1871. To appear in 6 Kas.

† Decision rendered October term, 1871. To appear in 23 Mich.

leave to introduce other testimony." *Held*, that "this was correct practice."

Germania Fire Ins. Co. vs. Curran, Adm'x.

—§ 59.

OTHER INSURANCE.

§ 63. *FIRE—Agency.*—The policy contained a provision that "if without written consent hereon there is any prior or subsequent insurance, this policy shall be void." The policy did not declare who was to sign the consent, but both the policy and renewal contained clauses declaring them invalid unless countersigned by the general agent at Chicago. Another agent of the company wrote a consent for other insurance upon the policy. *Held*, that the consent should have been signed by the general agent at Chicago, and that it cannot be sustained in the absence of his signature without distinct proof that it was made by some one authorized, or by his conduct fairly supposed to be authorized to bind the company; and *Held*, also, that "in order to bind companies for the unauthorized acts of agents, there must be something in the course of business, which the party dealing with them has fairly a right to rely on, and there must have been an honest reliance in fact. In other words, dealings with them must be governed by the same rules applied to other persons."

*Security Ins. Co. vs. Fay.**

Rep'd Jour'l, p. 203.

MICH. S. C.

LIMITATION.

§ 64. *FIRE—Clause in Policy—Waiver.*—The policy provided that "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and ad-

* Decision rendered April term, 1871. To appear in 22 Mich.

mitted as conclusive evidence against the validity of such claim." After furnishing proofs of loss, the insured received a letter from Ames, a general agent of the company, stating that the proofs were quite deficient in several particulars, and did not comply with the requirements of the policy, and that he would visit his place of residence during the next month and would call upon him. After waiting more than five months, during which time he was frequently told by the local agent that Ames was expected every week, he was informed by Ames, in answer to a letter written by himself, that it was no part of his duty to tell him how to make out his proofs of loss. The insured delayed bringing suit until more than fifteen months after the loss. *Held*, that "if, by any act or omission of the defendant, acting through its authorized agents, the plaintiff was induced to suspend the making and furnishing of his proofs of loss for a given time, such act or omission operates as a waiver of the limitation clause in the policy to that extent, and the time thus lost is to be added to the twelve months prescribed by the policy, in determining the time within which the action must be commenced;" and that "there was evidence from which the jury were warranted in finding that, by the acts and omissions of the authorized agent of the defendant, the plaintiff was delayed about five months in making his proofs of loss, and that by means thereof the time within which he might have commenced this action, without being barred by the limitation contained in the policy, was extended to a time later than the date of the commencement thereof."

Killips vs. The Putnam Fire Ins. Co.

—§ 58.

NOTICE.

§ 65. FIRE—*Notice to Agent*.—The policy required the insured to give immediate notice of his loss, but did not provide expressly to whom, or in what manner it should be given. Immediately after the loss, he gave the local agent of the company verbal notice. *Held*, that "the legal construction of the contract is that notice is to be given to the defendant, and that a verbal notice is sufficient. There

can be no doubt that notice to the local agent of the defendant at Waukesha, was notice to the defendant."

Miner vs. The Phoenix Ins. Co. Ins. Law Jour'l, Vol. 1, p. 41, and cases there cited.

Killips vs. The Putnam Fire Ins. Co.

—§ 58.

§ 66. FIRE—*Notice of Loss*.—The policy stipulated that the assured should forthwith give notice of loss to the company through the general agent at New York,—*Held*, that "notice was sufficient if the local agent of the company, acting upon information of the loss given by plaintiff immediately after the fire, communicated intelligence of the fire and loss of property to the defendant through its general agent in New York."

Germania Fire Ins. Co. vs. Curran, Adm'x.

—§ 59.

PRACTICE.

§ 67. FIRE—*Subsequent Insurance.—Waiver*.—The judge in the court below left it to the jury to determine whether or not there had been any waiver of a condition in the policies against subsequent insurance or of the forfeiture under that condition. There was no evidence tending to show a new contract or any act done by the insured through the encouragement of the company. *Held*, that the submission of this question to the jury was error on the part of the court below.

New York Central Ins. Co. vs. Watson.

—§ 60.

§ 68. FIRE—*Party to Suit.—Averment in Petition*.—The policy stipulated to make good to "the assured, his executors, administrators, and assigns, all such immediate loss or damage," etc. The assured died before the loss. *Held*, that the administratrix is the proper party to sue in such a case.

Angell on Ins. § 389; 2 Phil. on Ins. § 1976.

Held, also, that an averment that the house was personal property was not necessary in the petition.

Germania Fire Ins. Co. vs. Curran, Adm'x.

—§ 59.

PROOFS OF LOSS.

§ 69. FIRE—*Certificate of Justice—Waiver.*—The plaintiff mailed proofs of loss to the secretary of the company, at its place of business, and waited more than two months before he commenced his action, the company making no objection to the form or sufficiency of the proofs. *Held*, that “in the absence of evidence upon the subject, the presumption is that such proofs reached their destination by due course of mail.” *Held*, also, that “it was their duty, if they deemed the proofs insufficient, to notify the plaintiff of the fact within a reasonable time or the defects were waived.”

Troy Fire Ins. Co. *vs.* Carpenter, 4 Wis. 20; Warner *vs.* the Peoria M. & F. Ins. Co., 14 Ed. 318, and cases cited.

And that “the burden of proof is with the defendant to show that objection was thus made, on its behalf, to the sufficiency of the proofs, and there being no evidence tending to show that fact, it must be held that the defendant was satisfied therewith, and waived the objection that the proofs were not furnished in time, and did not contain the certificate of the proper justice of the peace or notary.”

Killips vs. The Putnam Fire Ins. Co.

— § 58.

§ 70. FIRE—*Time of Rendering.*—The policy provides that losses were “to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured and received at the office of the company,” and that the assured should give immediate notice thereof, but there was no provision in regard to the time of making the proofs of loss. *Held*, that “the most the defendant can successfully claim is that they should have been rendered within a reasonable time after the loss.”

Killips vs. The Putnam Fire Ins. Co.

— § 58.

§ 71. FIRE—*Adjusting Agent.*—The agent of the company, “immediately after the fire occurred, without waiting for formal preliminary notice from the plaintiff, called for the books and papers of the plaintiff, for the purpose of

making an inventory and ascertaining the amount of goods destroyed; which request was complied with by the plaintiff, and the examination was had of such books and papers by said agent, and all that the agent required was done by the plaintiff." The policy contained no reference to any separate adjusting agent, and nothing requiring the proofs to be furnished to such a person. *Held*, that "such fact would constitute evidence from which the jury may presume a waiver of the formal proofs, and the presence of a regular adjusting agent was not essential to make the waiver binding."

Security Ins. Co. vs. Fay.

—§ 63.

STATE LAWS.

§ 72. FIRE.—*Violation of—Estoppel—Practice.*—It was claimed that as the petition did not state that the insurance company had taken the necessary steps to authorize it to do business in the State as required by the statute laws, it was therefore defective, and that no testimony should have been admitted under it. *Held*, that such an averment was unnecessary, and that "a foreign insurance company doing business in this State, when sought to be made liable for contracts made, is estopped from saying that they are doing business contrary to law; and what the company could not set up as defense, as to that matter, the plaintiff need not aver."

Germania Fire Ins. Co. vs. Curran, Adm'x.

—§ 59.

SUBSEQUENT INSURANCE.

§ 73. FIRE—*Agency—Waiver—Estoppel.*—The policy contained the provision that "if, without written consent hereon, there is any prior or subsequent insurance, this policy shall be void." In October, after the policy was issued, the insured obtained other insurance on the same property. In December, an agent of the company residing in another place wrote upon the policy these words: "Other insurance to the amount of \$4,000 is hereby permitted. Dec. 7, 1867." *Held*, that the condition in the

policy "contemplates that the consent to future insurance shall be given in advance, for the policy becomes void if there is any subsequent insurance without consent. When the policy was taken out in October in the Detroit Company, this policy at once became void."

Western Mass. Ins. Co. vs. Riker, 10 Mich. 279.

Held, also, that "the subsequent written consent was not on its face a consent to past insurance, but its words import rather a future insurance. If made by a person having authority to waive a forfeiture, it would have no such force unless made with knowledge of the previous insurance and with a design to include it in the permission; and if sought to be made valid by any subsequent waiver or estoppel, that also must have been done with full knowledge of all the facts." *Held*, also, that an estoppel "can never arise by implication alone, except from some conduct which induces action, in reliance upon it, to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud."

Security Ins. Co. vs. Fay.

—§ 63.

§ 74. FIRE.—The policies "contained, among other things, a clause rendering them void in case any other insurance had been or should be made upon the property, and not consented to in writing by the company." Another policy was afterwards taken out in the Republic Insurance Company, covering the same and other property, without written consent thereto. *Held*, that "the policies became absolutely void at once upon the obtaining of the last insurance without consent. Nothing could revive them short of a new contract on valid consideration, or such conduct as by misleading the insured to their prejudice would operate as an estoppel."

Western Mass. Ins. Co. vs. Riker, 10 Mich. 279; *Security Ins. Co. vs. Fay*, — Mich.

Held, also, that "the fact that more property was included in the Republic policy is not material."

New York Central Ins. Co. vs. Watson

—§ 60.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

SUPREME COURT OF WISCONSIN.

WILLIAM KILLIPS, *Resp't*,

vs.

THE PUTNAM FIRE INS. CO., *App't*.* }

If the company deem the proofs of loss insufficient it is their duty to notify the insured of the fact within a reasonable time. Failure to do this waives the defects.

The burden of proof is on the company to show that such notice was given.

Notice of the loss to the local agent of the company was notice to the company, and verbal notice was sufficient.

When there is no restriction in the policy as to the time when the proofs of loss are to be rendered, the most the company can demand is that they be rendered within a reasonable time.

In the absence of any instructions to the jury, the same force and effect is to be given to the verdict as would be given to it had the court instructed them, and instructed them correctly on the law applicable to all questions of fact involved in the issue.

If by any acts or omissions of the company the insured is induced to suspend action for a time, such delay is not to be construed a part of the time to which his right of action is limited by the contract.

The time thus lost should be added to the time within which the action was to be commenced.

A letter from the agent of the company to the insured stating that the proofs of loss were defective without indicating wherein they were defective, and saying he would soon call on the insured, was a reasonable cause of delay in furnishing proofs of loss.

LYON, J.

On the 24th day of November, 1866, the plaintiff paid the premium and received from the defendant, the insurance company, a policy insuring him against loss or damage by fire to certain buildings and personal property, situated in the town of New Berlin, county of Wauke-ha, to the amount of \$1,320. On the 22d day of

*Decision rendered September 11, 1871.

June, 1867, and within the life of such policy, the insured property was destroyed by fire. Immediately thereafter, and probably on the next day after the fire, the plaintiff gave the local agent of the defendant, at Waukesha, verbal notice of the loss.

During the latter part of July or early in August of the same year, one E. B. Ames of Minneapolis, Minnesota, who was a general agent of the defendant, and Mr. Heath, its local agent, at Waukesha, visited the plaintiff at his residence, in New Berlin, and made an examination into the origin and circumstances of the fire, and the extent of the loss. In answer to a question put to the plaintiff on the trial as to what Ames there said to him about making out proofs of the loss, he testified as follows: "He asked if there was a justice in the neighborhood. I told him there was, but it was some ways off, and, says he 'Is it about as near to Waukesha as to the justice's office?' Well, I told him, I would rather go to Waukesha, because the road was better and about the same distance, and, said he, 'It will accomodate me to go to Waukesha, because it will be on my way home.' So I went to Waukesha."

Ames prepared an affidavit of the circumstances and extent of the loss, which was signed and sworn to by the plaintiff, and by direction of Ames, Mr. Heath furnished the plaintiff with certain blanks, which were required to be filled as part of the proofs of loss. These blanks were afterwards filled by Mr. Gibbs, since deceased, and soon after, (probably on the 31st of August,) were, together with the affidavit, sent by mail to Ames, at Minneapolis, by Messrs. Cook & Gibbs, the Attorneys for the plaintiff, in respect to that business. In due time Cook & Gibbs received the following letter from Ames:

*"General Northwestern Agency of the Putnam Fire Insurance Co.,
of Hartford, Conn. Capital, \$500,000.*

MINNEAPOLIS, MINN., Sept. 24th, 1867.

MESSRS. COOK & GIBBS:

Gentlemen—I am in receipt of yours of August 31st, enclosing what purports to be proof of loss of William Killips. The proofs are quite defective in several particulars, and do not comply with the requirements of the policy. I will visit Waukesha sometime during October, when I will call on you.

Respectfully yours,

E. B. AMES, *General Agent.*

After waiting several months, during which time the plaintiff was frequently informed by the local agent that Ames was expected at Waukesha every week, Mr. Cook sent another letter to Minneapolis, relative to the business, which, although addressed to the wrong person, reached Ames, who answered it as follows:

MINNEAPOLIS, MINN., March 1st, 1868.

MESSRS. COOK & BENNETT, Waukesha:

Gentlemen—On my return home a day or two since, I found your letter here addressed to T. C. Kendrick, the general agent of Putman Insurance for the East, on the subject of Killips' loss. From reading it, I presume it was designed for me, as I am the general agent who was there last summer, and I was the one to whom the proof was sent. In reference to proof of loss in case of Killips, you say you used the blanks furnished by agent Heath; if they are not correct it is the fault of the blanks and not of yourselves. One of the main requirements of the policy required in making out the proof of loss has not been complied with, although the blank was there, and all that was necessary was to fill in the blank. You, as attorneys, are aware that it is no part of my duty to tell you how you shall make out your proof of loss. The policy will tell you that, and to that I refer you.

Respectfully yours,

E. B. AMES, General Agent.

After the receipt of this letter the plaintiff made out new proofs of loss in duplicate, one set of which was delivered to the local agent in Waukesha on the 13th of July, 1868, and the other was mailed to the secretary of the defendant at Hartford, Connecticut, probably at about the same time. It does not appear that any objection was made by the agents or officers of the defendant, before this action was commenced to the sufficiency of such new proofs.

This action was brought upon the policy to recover for such loss, and the summons was duly served upon the defendant Sept. 30th, 1868.

On the trial in the Circuit Court no instructions were asked by either party and none were given to the jury. The plaintiff had a verdict for \$1,164.19 damages. The court overruled a motion for a new suit and caused judgment to be entered upon the verdict, from which judgment the defendant has appealed to this court.

The provisions of the contract between the parties contained in the policy of insurance, upon which the defendant relies to obtain a reversal of the judgment, are the following :

“Losses to be paid sixty days after due notice and satisfactory proofs of the same made by the assured and received at the office of this company. In case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire, the occupancy of the building insured, or containing the property insured, other insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate under seal of a magistrate, notary public or commis-

sioner of deeds, nearest the place of the fire, and not concerned in the loss, or related to the assured, stating that he has examined the circumstances attending the loss, knows the circumstances and character of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured."

"It is expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless commenced within twelve months next after the loss shall have occurred, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The motion for a new suit before mentioned was also predicated upon these conditions of the policy.

It is contended for the defendant that the conditions of the contract of insurance are fatal to the plaintiff's right to recover in this action for three reasons:

First, because the plaintiff failed to give immediate notice of the loss and make the necessary proofs thereof as required by the policy,

Second, because he failed to obtain the certificate of the nearest magistrate or notary public, which the policy required him to furnish, and

Third, because the action was not commenced within twelve months after the loss occurred.

The first and second objections are clearly not well taken. The last proofs were mailed to the secretary of the defendant at its place of business, in July, 1868, and in the absence of evidence upon the subject, the presumption is that such proofs reached their destination by due course of mail. The plaintiff waited more than two months before he commenced his action, and it does not appear that any objection was made to the form or sufficiency of the proofs by the officers of the defendant. It was their duty if they deemed the proofs insufficient to notify the plaintiff of the fact within a reasonable time, or the defects were waived. *Troy Fire Ins. Co. vs. Carpenter*, 4 Wis. 20; *Warner vs. the Peoria M. & F. Ins. Co.*, 14 Ed., 318, and cases cited.

The burden of proof is with the defendant to show that objection was thus made on its behalf to the sufficiency of the proofs, and there being no evidence tending to show that fact, it must be held

that the defendant was satisfied therewith, and waived the objection that the proofs were not furnished in time, and did not contain the certificate of the proper Justice of the Peace or Notary.

But there are other answers to these objections. The policy required the plaintiff to give immediate notice of his loss. It does not provide expressly to whom or in what manner it should have been given. In this it is unlike the case of *Cornell vs. The Milwaukee Mutual Fire Ins. Co.*, 18 Wis., 387, cited on the argument. In that case the contract was, that in case of loss the insured should within twenty days thereafter give notice thereof *in writing to the Secretary of the company*; and it was there held that a verbal notice to the local agent was not a compliance with the contract. In the present case the legal construction of the contract is that the notice is to be given to the defendant and that verbal notice is sufficient. There can be no doubt that notice to the local agent of the defendant, at Waukesha, was notice to the defendant, and that it was given in due time. *Miner vs. The Phoenix Ins. Co.* decided by this court, January term, 1871, and reported in the Insurance Law Journal, Vol., 1, No. 1, p. 41, and cases there cited. So much for the notice.

But it seems to be claimed that the contract also required the plaintiff to render to the defendant his proofs of loss *immediately*. This, we conceive, is not a correct construction of the contract. The notice must be given *immediately*, but there is no such restriction as to the time when the proofs shall be rendered. The most that the defendant can successfully claim is that they should have been rendered within a reasonable time after the loss. And if the question as to whether they were so rendered is material in this action, we must presume that the jury passed upon it and decided it in favor of the plaintiff.

It may be here remarked that in the absence of any instructions to the jury, the same force and effect is to be given to the verdict as would be given to it had the court instructed them, and instructed them correctly, on the law applicable to all questions of fact involved in the issue.

An application of this principle cures the alleged defect in the proofs in respect to the certificate of the justice. A certificate of a justice of the peace of Waukesha, accompanied the proofs, and forms a part thereof. This certificate is in the form required by the conditions of the policy, but was not made by the nearest justice to the place where the loss occurred, as therein required. The testimony of the plaintiff, which is hereinbefore stated, tended to show that the general agent waived the conditions of

the policy in that respect, and consented that the certificate might be made by a justice of Waukesha. We must presume that the jury found that such waiver was made, if the question was a material one in the case.

We now come to the consideration of the question, whether the action is barred by reason of the failure of the plaintiff to commence it within one year after the loss occurred. The failure of the defendant to notify the plaintiff that the last proofs were not satisfactory, is no waiver of the objection that the action was not commenced within the time limited in the contract, for the reason that such notice could have been of no possible service to the plaintiff. The doctrine of waiver which we have discussed applies only to the defects which can be remedied if the objection be taken. If the plaintiff was bound at all events to bring his action within a year after the loss, his right of action was gone before he furnished the proofs to the defendant, and no act of his could restore it. Hence, this objection was not waived by the silence of the defendant. *Cornell vs. Mutual Fire Ins. Co., supra.*

Provisions limiting the right of action on policies of insurance to much shorter periods than is prescribed by the statute laws of the country for the commencement of similar actions are almost universally inserted in such policies, and the binding force of those provisions upon the parties to the contracts has been as universally recognized by the courts. But such contract of limitation, in any given case, like all other stipulations and covenants, may be modified, waived or extended by the parties thereto. Or the party in whose favor the limitation is imposed may be estopped by his own act or omission from claiming the benefit of it. We are now to inquire whether there has been any act or omission on the part of the defendant, which operates either by way of estoppel or of waiver to extend the time limited by the contract within which the action should have been commenced. Or, to speak with more precision, perhaps, the inquiry is whether there is evidence in the case tending to prove such act or omission.

It will be remembered that the contract gives the defendant sixty days after satisfactory proof of the loss has been furnished within which to pay the same, and we have seen that the plaintiff is not *expressly* bound to furnish such proofs at or before any specific time. It would seem then to be a fair construction of the contract to hold that it gives the plaintiff, by necessary inference, the balance of the twelve months after deducting such sixty days or about ten months in which to prepare and furnish such proofs.

It does not seem to require much argument to demonstrate that

if by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises for a given time, such time should not be deemed a part of the twelve months to which his right of action is limited by the original contract. To hold otherwise would be in many cases to allow a person to take advantage of his own wrong. Cases may readily be supposed where, by delays in passing upon the sufficiency of proofs of loss, in investigating losses, or in replying to communications by general objections to proofs, refusing to specify wherein they are defective, and thus compelling the claimant to grope his way in the dark and find out as best he may wherein he has come short of fulfilling the requirements of his policy, and by many other means, the agents and officers of an insurance company might, without committing any act which the law would adjudge fraudulent, so embarrass the claimant that he would be entirely unable to make satisfactory proofs of his loss within the time which his contract gives him for that purpose, and yet be entirely free from any laches whatever. The idea that the remedy on the policy may be lost under such circumstances is not to be entertained for a moment. The plainest principles of justice demand that the time thus lost by the plaintiff without any fault on his part, but through the fault of the defendant, should be added to the time within which they contracted in the first instance that the action should be commenced, and the plaintiff be not barred of his remedy on the policy until such additional time has expired.

For discussions of the subject of waiver and estoppel in relation to such contracts, in addition to the cases before cited, see *Ames vs. N. Y. Union Ins. Co.*, 4 Kernan, 253; *Ripley vs. The Astor Ins. Co.*, 17 How. Pr., 445; *Mayor, etc., of New York vs. The Hamilton Fire Ins. Co.*, 10 Bosw, 537; same case, 29 N. Y., 45.

In the latter case, the action was upon a policy of insurance which contained a provision that an action upon it must be brought "within the term of six months after any loss or damage shall accrue," and it also contained a further provision that "payment of losses shall be made in sixty days from the date of the adjustment of the preliminary proofs of loss by the parties." In this case the corresponding provisions of the policy are, that the action must be brought "within twelve months next after the loss shall have occurred," and that payment of losses is to be made "sixty days after due notice and satisfactory proofs of the same, made by the assured, and received at the office of this company." It is obvious that there is no difference in principle in these corresponding

provisions of the two policies, and evidently the same rules of construction are applicable to each policy.

In the New York case, the court of appeals, without dissent, held that, construing the two provisions of the policy together, the term "after any loss or damage shall accrue" contained in the first provision must be construed to mean "after the right of action shall have accrued." Applying that rule of construction to the contract in the present case, the plaintiff's right of action on the policy was not barred by the limitation therein contained until September, 1869, or until nearly a year after the action was commenced. But in the view which we take of this case we are not called upon to decide whether the court of appeals has or has not laid down the true rule of construction. But we deem it proper to say that there are many considerations, both legal and equitable, which strongly incline us to approve the doctrine asserted by that court.

But to return to the subject of waiver, we have seen that, if by any act or omission of the defendant, acting through its authorized agents, the plaintiff was induced to suspend the making and furnishing of his proofs of loss for a given time, such act or omission operates as a waiver of the limitation clause in the policy to that extent, and the time thus lost is to be added to the twelve months prescribed by the policy, in determining the time within which the action thereon must be commenced. We have also stated what effect must be given to the verdict of the jury in this case, in view of the fact that no instructions were given by the court. It results from these principles, and from the views above expressed, that the only remaining question to be considered is: Did the testimony introduced on the trial in the circuit court tend to show that Ames, the general agent of the defendant, and by whose acts and omissions in this business the defendant is clearly bound, did, or omitted to do, any act, by reason whereof the plaintiff was reasonably delayed in making and furnishing his proofs of loss for a period of time equal to that between June 22d and September 30th?

We think that this question must be answered in the affirmative. The letter of September 24th, 1867, written by Ames and sent to the attorneys of the plaintiff stated generally that the proofs which had then been furnished were quite defective and did not comply with the requirements of the policy, but did not state wherein they were defective. It also notified the attorneys that the writer would visit Waukesha in October, and would call on them. The plaintiff had a right to infer from that letter that when the agent visited Waukesha, he would specify the particulars wherein his

proofs were defective and thus facilitate the correction of them. There is nothing therein from which the plaintiff could infer that Ames deemed it no part of his duty to tell him how to make out his proofs of loss, or that he would decline to do so, but quite the opposite. The letter of March 1st, 1868, conveyed the first intimation to the plaintiff of the hostile attitude of the agent towards him.

In relation to the letter of March 1st, we have only to say that if the writer did not mistake his legal duty, certainly as a business man acting on behalf of a company depending for its success upon the patronage of the public, he grievously mistook his duty both to his employer and to the defendant. But we are not quite sure that he did not mistake his legal duty. Had the plaintiff relied upon the proofs which he sent to Ames, and brought an action to recover his loss without furnishing additional proofs, we should hesitate somewhat before holding that the objections to such first proofs were not waived by the failure to specify wherein they were defective.

The letter of September 24th, then might have reasonably induced the plaintiff to stay proceedings in respect to perfecting his proofs until the agent should visit Waukesha. There is considerable testimony tending to show that it produced that effect. The agent did not visit Waukesha at all, but the local agent there frequently informed the plaintiff that he was expected there every week. We find nothing in the testimony from which the plaintiff could have inferred that the promised visit would not be made at some time during the fall or winter, until the letter of March 1st, was received, and such inference could only be drawn from that letter by reason of its silence on the subject, and its manifestly hostile tone and spirit.

We conclude therefore that there was evidence from which the jury were warranted in finding (as we must assume they did find), that by the acts and omissions of the authorized agent of the defendant the plaintiff was delayed about five months in making his proofs of loss, and that by means thereof the time within which he might have commenced this action without being barred by the limitation contained in the policy, was extended to a time later than September 30th, 1868—the date of the commencement thereof.

It follows from these views that the judgment of the Circuit Court must be affirmed.

SUPREME COURT OF IOWA,

DECEMBER TERM, 1870.

Appeal from Hardin Circuit Court.

HIBBARD & SPENCER, *Appellees*,
 vs.
 THE HARTFORD FIRE INS. CO., *App't.** }

The agent of the defendant on the 18th of the month, agreed to issue and send the plaintiff a policy on that day. The policy dated on the 18th was delivered on the 22d. On the 21st of the same month, the plaintiff agreed with the agent of another company for a policy on the same property and paid the premium, for which he received a receipt specifying that a policy should be issued as soon as a blank should be received. The policies of both companies contained conditions against prior and subsequent insurance without the consent of the company.—*Held*, that the policy of the defendant was the prior policy, and that the policy of the other company did not constitute a breach of it, if it was avoided by that company.

A receipt given by the agent of a company for premiums paid, specifying the property to be insured and stipulating that a policy shall be issued as soon as a blank shall be received, raises a contract of insurance in all respects like the contracts expressed in the policies commonly issued by the company.

In order to avoid a policy, on account of subsequent insurance, against an express condition therein, it must appear that the subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced.

Under the statute, the fact that the property insured was covered by a chattel mortgage at the time the policy was issued, does not render the policy void under a condition avoiding it if the insured was not "the sole and unconditional owner."

The statement made by the insured under oath in the proofs of loss, that there was an insurance upon the property in another company, for which the premium had been paid and a receipt taken, does not operate as an estoppel against evidence tending to show that the insurance was in fact invalid.

Action upon a policy of insurance issued to C. K. Howe against loss by fire to the amount of \$2,800 on his stock of hardware and tinware, and subsequently to the destruction of the property insured by fire, assigned to plaintiff. Upon a trial by a jury, there was a verdict and a judgment thereon for the amount of the policy and interest. Defendant appeals. The facts of the case are set out in the opinion.

ADAMS & ROBINSON AND O. P. SHIRAS, *for Appellant*.

MILLER & MILLER AND GRIFFITH & KNIGHT, *for Appellees*.

BECK, J.

I. The policy, which is the foundation of this action, contains a condition in the following words: "If the assured shall have, or

* Decision rendered January 27th, 1871.

shall hereafter make any other insurance upon the property hereby insured without the consent of this company written hereon, in such case this policy shall be void." As a defense the defendant alleges that, in violation of this condition, the insured, Howe, did cause the property to be insured by a policy issued by the Phoenix Insurance Company, January 21st, 1867. The policy sued on is dated January 19th, 1867. It appears from the evidence that Howe applied to the agent of defendant on the 18th day of December, 1867, for insurance, and it was arranged that the policy should be issued and sent to him on that day. Howe, not having received the policy from defendant's agent, nor heard from him in regard to the business, on the 21st of the same month applied to the agent of the Phoenix Insurance Company for a policy covering his property. The terms of the insurance were agreed upon, but the agent, having no blank policies, executed a receipt to Howe for the amount of the premium then paid him, specifying the property to be insured, which was the same covered by the policy issued by defendant, and stipulating that a policy would be issued as soon as a blank should be received. The agent of the Phoenix Company was not informed by Howe of his application to defendant's agent for insurance, and it appears that Howe, at the time, did not expect to receive the policy of defendant as it had not been sent to him according to the prior arrangement. On the 22d, the day subsequent to the transaction with the agent of the Phoenix Company, the agent of defendant delivered to Howe the policy sued on, dated on the 18th, and received payment of the premium. Howe did not inform him of his transaction with the Phoenix Company. The property covered by these policies was destroyed by fire on the 26th. Under these facts defendant insists that the transaction with the Phoenix Company is in violation of the conditions of the policy against other insurance, quoted above, and that defendant's contract is avoided thereby.

The question here presented is of very great difficulty, and its solution, either upon principle or authority, is not entirely free from doubt. Two preliminary questions may be considered, the determination of which will aid in reaching the final conclusion upon this point.

First. Which was the prior insurance, that of the defendant, or the Phoenix Company? It quite satisfactorily appears to us that the policy issued by defendant must be considered as commencing on the 18th, the day of its date. It was, in fact, issued on that day, and the premium covered the time intervening between that date

and the day of its delivery, the 22d. Defendant, after having collected the premium and delivered the policy bearing date on the 18th, cannot be heard to deny that the policy did not operate until its delivery. If the policy did not bind defendant until the 22d, then, has defendant received premium for the time intervening before that date and the 18th, which it has not earned. But this it cannot be permitted to claim.

Second. What was the effect of the receipt given by the agent of the Phoenix Insurance Company? It must be conceded that if it bound the company at all, and its binding effect cannot be denied, it raised a contract of insurance in all respects like the contracts of the company as expressed in the policies commonly issued by them. The agent was not clothed with power to vary or change the policy of the company, and it cannot be presumed that such a thing was contemplated by either the agent or the assured when the receipt was executed. The transaction, then, was a contract for insurance upon the usual terms and conditions as expressed in the policy which the agent was empowered to issue. It is shown by the evidence that the policies of the Phoenix Company contained a condition, similar to the condition of the policy sued on, against prior or subsequent insurance without consent of the company indorsed on the policy, and declaring the same shall avoid the contract. It appears that the agents were authorized to issue policies of this form, and that they embodied the contracts of insurance as commonly entered into by the company. The contract, therefore, between the Phoenix Company and Howe must be considered as containing a condition against other insurance, as above stated. We now have the case of two policies, given at different dates, covering the same property, each having a condition against other insurance—the prior and subsequent, and providing that a breach thereof shall avoid the respective instruments. The question for us to determine is, which, if either, of these instruments is valid, and which is avoided by the operation of a breach of the condition? It will be remembered that if breach of the condition does not absolutely render void and of no effect the policy, it simply renders it voidable; its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition, the policy may be enforced as though no forfeiture had ever happened. The act of the company, whereby it is shown that the instrument is treated as avoided, must be shown in order to defeat recovery thereon. If no such act or objection on the part

of the company be shown, the contract will be considered binding. It is not necessary here to state what will amount to an act avoiding the contract, or when it must be done, further than to observe that it must appear that the underwriter relied upon the breach of the condition to defeat the contract. Of course, the company issuing the subsequent policy could not rely upon the breach of the condition in order to avoid the instrument until knowledge thereof was acquired, and its acts treating the policy as avoided would be sufficient if shown to have been done after such knowledge. The same principles will apply to the prior policy. It was not absolutely void on account of the subsequent insurance, but was voidable only. It was a binding instrument when executed, and would so continue until some act done by defendant intending to avoid it on account of the breach of the condition against the subsequent insurance. But it could not be avoided on account of the Phoenix policy, unless that instrument itself was valid.

If it so happened that, when the action was brought on defendant's policy, or even at the trial, it was made to appear that the Phoenix policy could not be enforced—was avoided on account of the breach of a condition therein—it is obvious that the existence of that instrument shown to be inoperative, would not constitute a breach of the condition in defendant's policy against subsequent insurance. That condition is against actual insurance to be subsequently made. The Phoenix policy created no insurance if it was avoided by the act of the company, and therefore did not constitute a breach of defendant's policy. The general principle of law upon this point may be stated as follows: In order to avoid a policy on account of subsequent insurance, against an express condition therein, it must appear that such subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced. If it cannot be enforced, it is no breach of the prior policy. This principle is substantially embodied in the fourteenth instruction given by the court to the jury. The instruction could have been more happily worded, but its import is quite clear, to the effect, that, if the Phoenix company treated its policy as avoided, after notice of the existence of defendant's policy, it constituted no such subsequent insurance as would invalidate the policy in suit.

Our conclusion upon this branch of the case is not without support of the authorities. The following cases may be cited as sustaining the principle above stated.

Jackson vs. Mass. Mutual Ins. Co., 23 Pick., 418; *Clark vs. New England Ins. Co.*, 6 Cush., 343; *Gale vs. Belknap Ins. Co.*, 41 N. H., 170; *Stacy vs. Franklin Ins. Co.*, 2 Watts & Sug., 506; *Philbrook vs. New England Mut. Ins. Co.*, 37 Maine, 137; *Schenck vs. Mercu Co. Mut. Ins. Co.*, 4 Zab., 447; *Jackson vs. Farmers Ins. Co.*, 5 Gray, 52.

The doctrine which we have above announced does not go to the full extent of some of the cases just cited. It is held in *Philbrook vs. The New England Mut. Ins. Co.*, *supra*, that the prior policy is valid even though the subsequent policy is not avoided by the underwriter issuing it, but the loss thereon is paid; and in others of these cases the rule is not expressly based upon the fact that the subsequent policy was treated by the underwriter issuing it as avoided.

The doctrine which we recognize here is based upon the fact that the subsequent policy was treated and considered as avoided by the company issuing it, as soon as it had notice of the prior insurance. In our view this is a most important consideration, for if the underwriter in the second policy does not treat it as avoided, it cannot so be considered by the insured or the company issuing the prior policy. The condition against prior insurance in the subsequent policy is for the benefit of the insured, who may at his option, waive it or insist upon enforcing its terms. If he seeks to enforce the condition, and treats the policy as a void contract, it is indeed difficult to see upon what grounds it may be regarded as valid as an insurance that will defeat the prior policy.

In this view our conclusion is not in conflict with *David vs. The Hartford Ins. Co.*, 13 Iowa, 69, and *Bigler vs. The New York Central Ins. Co.*, 20 Barb., 635, and the same case 22 N. Y. 402. In the first of these cases an action was brought upon a policy containing a condition against subsequent insurance. Other insurance taken after the date of the policy was relied upon to defeat recovery. The plaintiff claimed that the subsequent policies, on account of certain conditions, which are violated, were void. It is held that these policies are not void, but on account of the breach of their conditions, might have been avoided. As they were treated as valid contracts by both of the parties thereto, the losses accruing thereon having been paid by the companies executing the subsequent policies, the breaches of the conditions were regarded as waived and the instruments held to be binding upon the respective underwriters. The argument supporting the conclusion reached

by the court may not entirely accord with the reasoning we have above adopted, but the result reached, we believe, is not inconsistent with the views we have herein expressed. *Bigler vs. The New York Central Ins. Co.*, 20 Barb., 685, and 22 N. Y., 402, in its facts very nearly resemble *David vs. The Hartford Ins. Co.*, the underwriter taking the subsequent risk having waived the forfeiture and paid the loss under the policy. There are arguments and positions taken in the opinions in this case that are not consistent with the view we have adopted. They reach further than the mere support of the conclusion arrived at upon the facts involved in the case, the Court of Appeals holding (two justices dissenting) that the first policy would be defeated even though the second was utterly void. This point was not in the case. While we may not be inclined to dispute the conclusion arrived at upon the facts presented, which we think is not at all in conflict with our views, we cannot assent either to the reasoning adopted by the court, or the conclusions reached upon the facts not before it for adjudication. *Carpenter vs. The Providence & Washington Ins. Co.*, 16 Pet., 495, is cited in support of the rule that where there are two successive policies, both containing conditions of avoidance on account of other, prior or subsequent insurance, without notice, the first may be avoided on account of the second insurance. This case, we have observed, is often cited in support of this rule, and is so referred to in *David vs. The Hartford Ins. Co.*, and *Bigler vs. The New York Central Ins. Co.*, *supra*.

If such a rule be found in the case—but it does not so appear to us—its annunciation was not called for by the facts before the court, and made the basis of the decision. The policy upon which suit was brought is considered, in the opinion, the second instrument, and the court holds that it was defeated by a condition therein against prior insurance, which, in fact, existed when it was issued. See page 509. The conclusion arrived at, we think, is not in conflict with the course of argument adopted by us and the result reached in this case. The argument, however, adopted by the court in reaching the conclusion, is hardly consistent either with our reasoning or its results. But inasmuch as the facts are dissimilar to those before us, and the point ruled not necessarily in conflict with our decision, the case cannot be regarded as an authority against the principles we herein recognize.

II. During the progress of the trial defendant offered to show that the property insured was covered by a chattel mortgage at the time the policy was issued. This evidence was offered to

establish a forfeiture of a condition of the policy to the effect that if the insured was not "*the sole and unconditional owner*" of the property the policy should be void. The court excluded the evidence, holding it would not establish a breach of the condition. While under the statute, revision, section 2217, the mortgagee holds the legal title to the personal property covered by a mortgage, the mortgagor is nevertheless considered the owner. Such is the current of the authorities as to mortgages at common law, which, as to the title and ownership of the property conveyed, are not different from chattel mortgages under the statute above cited. See *White vs. Rittenmyer*, decided at the present term of this court. It is considered that the mortgage creates a lien, and that the title of the property is conveyed to the mortgagee for the purpose, and no other, of enabling him to enforce such lien. The ownership remains in the mortgagor. It is absolute, and depends upon no condition, and may, therefore, be said to be unconditional. It is true his ownership may be defeated upon the happening of certain conditions, but this cannot be said to make his ownership conditional. The property of the chattels is absolutely and unconditionally in the mortgagor. This view finds support in the following authorities: *Rollins vs. Columbian Mut. Fire Ins. Co.*, 5 Foster (N. H.) 200; *Pollard vs. Somerset Mut. Fire Ins. Co.*, 42 Me., 221; *Rice vs. Town*, 1 Gray, 426; *Shepard vs. Union Mut. Fire Ins. Co.*, 38 N. H., 232; *Norcross vs. Ins. Co.*, 17 Penn. St., 429; *Conover vs. Mut. Ins. Co.*, 3 Denio, 254; same case, 1 Comst., 290. In our opinion the evidence was properly excluded.

III. The policy sued on contains a condition requiring the assured in case of loss "to give immediate notice thereof," and to render "to the company a particular account of said loss, under oath, stating * * * other insurance, if any, and copies of all policies." After the loss, the insured, in compliance with this condition, in his proof of loss, stated, under oath, as follows: "There was also an insurance on the hardware stock of Clifton K. Howe by the Phoenix Ins. Co., the premium for the sum of \$56.50 paid to said company, and a receipt given by said company, which reads as follows: Received of C. K. Howe, \$56.50, full premium, policy and survey fees on \$2,000 insurance on his stock of hardware in frame building, &c., * * * Policy to be issued as soon as I receive blank policy, to bear date herewith. Geo. W. Miller, Agent Phoenix Ins. Co.," &c. The defendant claims the act of Howe in stating the insurance in the Phoenix Company in the

proof of loss, estops him, denying the validity of the contract with that company, and that so far as defendant's rights are to be affected, it must be considered that there was a valid insurance by a policy of the Phoenix Insurance Company, covering the property destroyed. The law of estoppel is founded upon the obligation which rests upon every man to speak and act according to the truth, and the just policy of the law which will not permit men to deny that which they have solemnly asserted or acted upon as true. The rule is intended to prevent great mischief and wrong resulting from the want of confidence in the intercourse of men, which would naturally exist if they were permitted to deny their admissions and contradict the proper inferences drawn from their acts in the business affairs of life. It is a rule established to secure truth and justice. Under its operations no one will be permitted to deny his assertions or admissions of fact, which are designed to influence another's acts, and upon which he has acted. But the doctrine must be applied in strictness, and the admission or act relied on as an estoppel must clearly appear to have been made or done by the party who is sought to be bound thereby. "Hence, estoppel must be certain to every intent, for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts." 1 Greenleaf's Ev., § 22. In the light of these principles we will consider the act of Howe, which is claimed to operate as an estoppel. The proof of loss made by him states that there was an insurance in the Phoenix Company, and sets out the writing upon which the contract of insurance was founded. The facts stated were:

1st. The existence of the insurance.

2d. The existence of a receipt, which is claimed to be evidence of the contract with the Phoenix Company.

These admissions of fact are not denied in this action. There were no others made by Howe. He does not pretend to state any other facts connected with the alleged insurance in the Phoenix Company, yet it certainly cannot be denied that many other facts connected with the transaction determined the validity of the contract of insurance. These facts, too, were extrinsic as to the receipt and other matters stated by Howe. Neither does Howe state the legal conclusion that the Phoenix insurance is valid and binding, and that is the very thing which defendant claims plaintiff is estopped to deny. The facts admitted by Howe are not denied in this action. The validity of the Phoenix insurance he did not claim or set up in the proof of loss; there is, therefore, no

foundation for an estoppel as to that fact. It may be claimed that by stating the fact of an insurance in the Phoenix Company he must be understood as referring to a valid insurance. Such an inference is unavoidable. There is no complaint that the proof of loss is not in compliance with the condition in the policy sued on, or that under that condition the statement should have contained other facts that do not appear therein. It cannot, therefore, be said that any attempt at concealment was made by Howe in the proof of loss. The language used by him in the proof of loss, referring to the Phoenix insurance, can fairly be understood in no other sense than that there was a contract of insurance with that company. It cannot with any degree of justice be claimed that he avers that contract to constitute a valid and subsisting insurance. These views lead us to the conclusion that the statement in the proof of loss did not operate as an estoppel against evidence tending to show that the Phoenix insurance was in fact invalid. Such evidence was properly admitted at the trial.

IV. The Court instructed the jury that if the defendant treated the policy in suit as in force, after full knowledge of the subsequent insurance by the Phoenix Company, such conduct will be regarded as a waiver of the forfeiture and an election to treat the policy as in force; and that, in order to determine whether the defendant did treat the policy as in full force, "it was proper for the jury to consider when the premium was paid by Howe and forwarded to the company, the acts of the company in reference to demanding and requiring the assured to answer certain questions propounded by the State agent touching the loss, &c., the acts of the defendant in selecting appraisers, and all other facts in evidence bearing on the question." These instructions the defendant claims are erroneous, or, rather, being inapplicable to the facts, they were improperly given. So far as they embody principles of law they are not objectionable, and are not so regarded by defendant's counsel; at least no objections are made to them. While it may be admitted that the acts referred to in the instructions would of themselves, considered separately, be no evidence of the waiver of the forfeiture of the policy, yet, when considered together and in connection with all the facts of the case, they tend, though it may be slightly, to establish that fact. And it may be admitted that some of the acts referred to in the instructions were not established by the evidence, having been done by the agents of defendants when not within the scope of their authority. But another instruction clearly informs the jury that such acts of the agents do not bind the defendant.

The application of the instructions to the facts of the case, in our opinion, could have been correctly made by the jury; at least it does not appear to us to have been a matter of so great difficulty that there is a probability the jury were confused or misled in the attempt.

V. Other instructions asked by the defendant, being in conflict with the principles we have announced in this opinion, were properly refused. They need not be separately considered. They relate to the validity and effect of the Phoenix insurance, and to the effect to be given the statements of Howe in the proof of loss. They present these questions in different views, all, however, embodying principles not in accord with the doctrines we herein recognize. Further discussion of these doctrines, and their special application to the several instructions, would not be profitable.

VI. One of the defenses of the action pleaded by defendant is, that the property insured was burned by Howe himself, and the loss was not the result of accident or any other cause which would render defendant liable on the policy. Evidence was given to the jury which, it is claimed, tended to support this defense. For that purpose, defendant offered to prove the insolvency of Howe at the time of the loss of the property. This evidence was excluded as immaterial and not relevant to the issue. Without passing upon the question here presented, we are of opinion that even if it be conceded that the evidence should have been admitted, it is not such an error as will require the reversal of the judgment. If the evidence had been admitted, and upon it, and the other evidence tending to support this defense, the jury had found that the property was burned by Howe, the verdict, in our opinion, could not have been sustained, and should have been set aside as being in conflict with the evidence. In our opinion, all of the evidence of defendant upon this point, considered together, is of such inconsiderable force as, uncontradicted, not to be sufficient to warrant a presumption that the fire was the result of Howe's own act. The exclusion of the evidence was, therefore, error without prejudice.

The judgment of the District Court is affirmed.

MILLER, J., Dissenting.

DISSENTING OPINION.

MILLER, J.

I find myself unable to agree with the reasoning and conclusions reached by the majority, as expressed in the foregoing opinion.

That there was double insurance on the same property is conceded. One in the Phoenix Insurance Company and one in the Hartford Insurance Company. Each policy provided that "if the assured shall have, or shall hereafter make, any other insurance upon the property hereby insured, without the consent of the company written hereon, in such case this policy shall be void." If, when the second policy was taken out, the assured had a prior insurance on the same property, the second policy was *ipso facto* void unless consented to by the company in writing on the policy. Which of the two policies, then, was the second or subsequent one? The assured applied to the agent of the Hartford Company on the 18th day of December, 1867, for insurance, and it was arranged, not with the agent, but with a clerk in the office, that a policy would be made out and sent to him on the same day. Waiting until the 21st of the same month, and not receiving the policy, the assured, under the belief that he would not receive it—that it would not be issued, the premium not having been paid,—applied to an agent of the Phoenix Insurance Company, and on that day obtained insurance on the same property. On the next day (the 22d) the policy on which this action is brought was received by the assured from the agent of the Hartford Company, bearing date the 18th—four days prior to that of the Phoenix Company—and the assured then paid the premium. When the assured applied to the Phoenix Company for insurance he had no other insurance. When he received the policy sued on, the next day, he did have other insurance. He *then* had double insurance and not before. The first insurance was obtained from the Phoenix Company, the second in the Hartford, and the fact that the policy received of the latter company bore date prior to that of the former does not affect the question. The object and purpose of the clause in the policy by which it is avoided, when the assured has prior insurance, is to prevent or remove the temptation to destroy property insured above its value, and thereby protect the insurer against this species of fraud. And it is the *fact* of there being prior insurance, not the date of the policy, that is material and operates to render the second insurance void. The majority opinion holds that the Phoenix policy was the subsequent insurance, and void because of prior insurance in the Hartford Company; and this holding is based entirely upon the fact that the policy in the Hartford Company bears date prior to that in the Phoenix Company, and the premium charged ran from the date of the policy; and it is held that the Phoenix policy was forfeited *because of prior insurance* in the Hartford Company, of which no notice was given by the assured. I

have already shown that at the time the assured obtained insurance with the Phoenix Company he had *in fact* no other insurance. Having, then, no insurance, there could be no forfeiture, for this reason, of the Phoenix policy. On the other hand, when the assured received the insurance and paid the premium on the policy sued on, *he did have in fact other insurance* of which he gave no notice. The duty of the party assured was to inform the insurer of any other insurance held by him on the same property; failing to do this, he committed a fraud on the insurer. This he could not have done when he procured his insurance in the Phoenix Company, for he had no other insurance then. He was therefore guilty of no fraud on that company, or of any violation of the terms or conditions of the policy in respect to other insurance. But when he received the defendant's policy he then had other insurance, and it was his duty to notify the company of that fact and obtain their consent thereto. Failing to do this he was guilty of a fraud on the company, and of a violation of the clause of the policy before referred to, and the policy became void for that reason. There is nothing in the case to show that the appellant in any manner waived this forfeiture. The majority opinion, by holding the Phoenix policy void and the one sued on valid, punishes the assured when acting in good faith with the former, and rewards his bad faith toward the latter company. The fundamental error of the opinion, in my judgment, lies in taking that for the prior insurance whose policy is prior in date, without reference to the *fact* when the contract of insurance was made. The insurance in the Hartford Company was effected at the time, and not before, the policy was delivered and premium paid, which was after that of the Phoenix. No valid contract of insurance with defendant existed prior to that time, hence, no insurance in fact, the existence of which controls the question before us. On the other hand, as I have shown, at the time insurance was effected in the Hartford Company the assured then had, both in law and in fact, other insurance in the Phoenix Company.

The appellant is the company defrauded; the Phoenix Company has not been, at least not in this respect. On what principle, then, of law or justice, can the policy of the Phoenix Company be held void and that of the Hartford held valid? In my judgment, the Phoenix policy was not forfeited because of prior insurance (for there was none in fact), and the policy sued on was forfeited because of the prior insurance in the Phoenix Company, obtained by the assured, of which he failed to notify the defendant at the time he received their policy, or within a reasonable time thereafter.

II. On the trial defendant offered evidence to show that at the time the insurance was obtained the property insured was covered by a chattel mortgage, which was refused. The evidence was for the purpose of showing that the condition of the policy, that *the assured was "the sole and unconditional owner"* of the property insured, was forfeited. The majority opinion holds that the mortgagor of personal property, like the mortgagor of lands, is the "owner." Here I think the Court has fallen into a very grave error as to the law. Without stopping to inquire into the rights of mortgagors at common law, it is sufficient to show that by our statute, "in the absence of stipulations to the contrary," the mortgagor of *real property* retains the legal title and right of possession thereof; but in the case of *personal property*, "*the mortgagee holds that title and right.*" Here the statute confers the title and the right of possession on the mortgagee of chattels, the mortgagor having a naked equity of redemption, a mere right to defeat the title of the mortgagee by a performance of the condition of the mortgage, and on a failure to comply with those conditions the mortgagee becomes the absolute owner. *Bean vs. Barney & Scott*, 10 Iowa, 498. The mortgagor of personal property is so far from having any ownership in the goods covered by the mortgage that he has no interest therein which can be levied upon and sold under execution, unless *by the terms of the mortgage* he is entitled to and in fact retains the possession. *Campbell vs. Leonard*, 11 Iowa, 489; *Rindskopf Bros. & Co. vs. Lyman*, 16 Iowa, 260. In what sense, then, can it be said that the mortgagor of personal property is "considered the owner?" None whatever. Much less can it be maintained that he is the "sole and unconditional owner." In my judgment the evidence was material, and should have been admitted. I have thus very briefly stated the principal grounds of my dissent, upon either of which I hold the judgment should have been reversed.

SUPREME COURT OF KANSAS.

ERROR FROM LEAVENWORTH COUNTY.

THE GERMANIA FIRE INS. CO., OF THE CITY	}
OF NEW YORK, <i>Plff in Error</i> ,	
<i>vs.</i>	
MARY CURRAN, ADM'X OF THE ESTATE OF JOHN	
CURRAN, DEC'D, <i>Def't in Error</i> .*	

It is not necessary for the plaintiff to aver in his petition, that a foreign insurance company has taken the necessary steps to authorize it to do business in the State, as required by the statute laws, and the company is estopped from saying it is doing business in the State contrary to such law.

When the insured has died and the policy stipulated to make good to "the assured, his executors, administrators and assigns, all such immediate loss or damage, etc.," the administratrix is the proper party to sue, and an averment that the house was personal property is not necessary.

Where the policy stipulated that the insured should forthwith give proof of loss to the company through the general agent in New York, notice of loss was sufficient if the local agent of the company, acting upon information of the loss, given by the plaintiff immediately after the fire, communicated intelligence of the fire and loss of property to the company, through its general agent in New York.

The failure of the court to give a construction to a writing was error, but is no ground for reversing the judgment, because it is clear that the jury must have put a correct construction upon it, and such as the court should have given.

The statement made by the plaintiff, under oath, in an examination by the attorney of the defendant, that she had sold the property before the loss, does not estop her from denying the sale.

In the course of the trial the plaintiff announced that he had closed his testimony, but before anything further had taken place, asked and obtained leave to introduce other testimony. This was correct practice.

The opinion of the court contains a statement of the facts of the case to which reference is had.

CLOUGH & WHEAT, for Plff in Error.

J. M. McCABEN, for Def't in Error.

KINGMAN, Ch. J.

On the 17th day of April, 1867, the plaintiff in error (defendant below) insured the dwelling of John Curran, in Leavenworth, for one year. On the 28th day of June of that year, John Curran died. On the 17th day of September, the building was destroyed by fire. The defendant in error (plaintiff below), having administered on the estate of Curran, her late husband, brought an action

*Decision rendered May 15, 1871.

for \$150, the amount insured by the plaintiff in error. For this amount with interest she recovered judgment. To reverse this judgment the plaintiff in error brings the case to this court, alleging numerous errors in pleading, in the admission and rejection of testimony and in the instructions given and refused by the court. Such of these alleged errors as are deemed of importance will be noticed in the opinion. It is claimed that as the petition did not state that the insurance company had taken the necessary steps to authorize it to do business in this State as required by Statute Laws 1863, page 60, therefore it was defective and no testimony should have been admitted under it. Such an averment was not only unnecessary, but in such an action as this, the insurance company could not set up such a state of facts as a defense.

A foreign insurance company doing business in this State, when sought to be made liable for contracts made, is estopped from saying that they are doing business contrary to law, and what the company could not set up as a defense as to that matter, the plaintiff need not aver.

As a further objection to the petition, it is urged that the administratrix could not recover without an averment that the house was personal property. The policy stipulated to make good to "the assured, his executors, administrators and assigns, all such immediate loss or damage, etc.," and the administratrix is the proper party to sue in such a case. Angell on Ins., Sec. 389; 2 Phil. on Ins., Sec. 1976.

There was testimony tending to show that John Curran owned the property insured which he had built on leased property. It is true that Mrs. Curran speaks of it as though she had control of it, that she paid the insurance premium, that she occupied it with her family; yet, this is to be taken in connection with the other testimony, and we think the jury very properly found it to have been the property of John Curran when insured.

The policy sued on stipulated that the assured should forthwith give notice of loss to the company through the general agent in New York. There is no direct positive proof of such notice, and therefore it is claimed there could be no recovery, but the testimony showed that the local agent in Leavenworth gave written notice within forty-eight hours of the loss to the general agent in New York, and that Mrs. Curran was at the local agent's office immediately after the fire, and one cannot read the case without a full conviction that she was in earnest in her efforts to get the insurance money. The jury were instructed on this point that the plaintiff could not recover

unless she gave the notice as soon as she could with reasonable effort do so, but that the notice was sufficient, if the local agent of the company, acting upon information of the loss, given by plaintiff immediately after the fire, communicated intelligence of the fire and loss of property to the defendant, through its general agent in New York. We think this was a fair presentation of the law, as applicable to the testimony in this case. The jury must have found that the notice was given by the local agent upon information furnished by the plaintiffs, and this is a reasonable inference, from the testimony, and a substantial compliance with the requirements of the policy.

It is insisted that the preliminary proofs of loss required by the policy, and given in evidence, are not such as the policy requires, and the case seems to have been tried on this hypothesis. These proofs are very full and minute, and but one objection is made to them in this court and that alone will be noticed.

The objection is at most very technical and not to be favored, but even that will be found upon inspection to be illusory. In addition to the proof of loss the policy required that "the insurance shall also produce a certificate under the hand and seal of a magistrate, Notary Public or Commissioner of deeds (nearest to the place of fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes the assured has without fraud sustained loss on the property insured to the amount which such Magistrate, Notary Public, or Commissioner of deeds shall certify."

The certificate states that the magistrate, who makes it resides most contiguous to the property destroyed, that he is not concerned in the loss or claim as a creditor or otherwise, or related to the insured or sufferers, and then states "that I have examined the circumstances attending the loss, fire or damaged as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that the estate of John Curran, deceased, has, by misfortune and without fraud or evil practice on the part of any of the heirs or any one interested in said estate, sustained loss and damage to the amount of seven hundred and sixty dollars and forty cents." A comparison of the requirement of the policy and the certificate made shows a substantial and as far as the situation of the parties permitted, almost a literal compliance with the stipulation of the policy, and when the object of the stipulation is considered, the objection without a color of reason.

Another point of more difficulty is this: After the death of her husband, and before the loss by fire, the plaintiff made a contract to sell the property to one Wilson. This contract is in writing. It is so obscure and uncertain that it is almost impossible to give it a definite construction. The court below avoided the difficulty by telling the jury that "the meaning and import of the instrument is not definite and certain, and, therefore, the question is submitted to the jury to determine the intention of the parties."

It was undoubtedly the duty of the court to give a construction to the writing, and the failure to do so was error, but it is no ground for reversing the judgment, because it is clear that the jury must have put upon it a correct construction such as the court should have given it, or they could not have found for the plaintiff. *Acker vs. Cutter*, 8 Gray, 248. The instrument is not of itself a conveyance of the property, or a promise to convey. The most that can be made out of it is that it is an informal memorandum of terms which the parties had agreed to about the property, which was to be carried into effect in October afterwards.

In her examination by the insurance company's attorney the plaintiff, under oath, stated that she had sold the property to Wilson. This statement was made soon after the loss, and it was this statement undoubtedly that mainly induced the company to resist the payment. The counsel for plaintiff in error insists that this statement should operate as an estoppel on the administratrix so as to prevent her from denying the sale of the property. It has not one of the elements of an estoppel. It went to the jury and had its proper influence in forming their decision, and this is all that can be justly claimed for it. In the course of the trial plaintiff announced that he had closed his testimony, but before anything further had taken place, asked and obtained leave to introduce other testimony. This was correct practice.

From what has been said, it is apparent that the court properly refused the instructions asked by the plaintiff in error, and did not err to the prejudice of the same party in the instructions given.

The judgment must be affirmed.

VALENTINE, J., concurring.

BREWER, J., was not on the bench when this case was submitted.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1870.

In Error to the Circuit Court of the United States, for the District of Maryland.

THE BROOKLYN LIFE INS. CO., *Pl'ff in Error*, }
vs.
 HELEN A. M. MILLER.* }

Issues of fact in civil cases pending in the United States Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury.

Such submission necessarily implies that the facts shall be found by the court, and such finding has the same effect as the verdict of a jury in a case where no such waiver is made.

Where a jury is waived in the United States Circuit Court and issues of fact are submitted to the court, the finding may be either general or special.

Whether such finding is general or special the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bill of exceptions, may be reviewed in the Supreme Court.

The facts were tried by the Circuit Court and could only be re-examined under the rules of the common law, either by the granting of a new trial by the court where the issue was tried; or to which the record was returnable, or by the award of a *venue facias de novo* by an appellate court for some error of law, which intervened in the proceedings.

All matters of fact must be found by the Circuit Court and not by the Supreme Court.

Matters of fact found by the Circuit Court cannot be re-examined in the Supreme Court. The review when the finding is general is confined to the rulings of the court, in the progress of the trial; and when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Where the company executed and sent a policy to their general agents, who delivered it to the assured, receiving from him his premium notes and agreeing to call upon another person for the cash part of the premium at some future time, and waived the payment for several months, treating the policy as an executed contract, such acts of the agents were a waiver of the payment on the part of the company.

Where the policy is delivered without requiring payment the presumption is, especially if it is a stock company, that a credit was intended, and where a credit is intended the policy is valid though the premium was not paid at the time the policy was delivered.

Where premium notes are given and there is no evidence to impeach the *bona fides* of the transaction, the company must be held to assume a reciprocal obligation.

Mr. Justice CLIFFORD, delivered the opinion of Court.

Issues of fact in civil cases pending in the circuit courts may be tried and determined by the court without the intervention of a

*Decision rendered—1871.

jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury.

Such a submission necessarily implies that the facts shall be found by the court, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury in a case where no such waiver is made.

Exceptions, however, may be made to the rulings of the court made in the progress of the trial, and if duly taken at the time the rulings were made the rulings may be reviewed here, provided the questions are properly presented by a bill of exceptions; and when the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment.—13 Stat. at Large, 501.

On the 25th of June, 1868, the defendants insured the life of the husband of the plaintiff in the amount of five thousand dollars for the term of his natural life, "with participation of profits." Part of the premium, to wit, the sum of two hundred and fifty-four dollars and eighty-five cents was required by the rules of the company to be paid at the time the policy was delivered, and the policy recites that the plaintiff paid that sum to the defendants in hand, and the policy also states that the insured agreed to pay them a like sum on or before the twenty-first of June in each year during the continuance of the policy, and that the defendants in consideration of those sums and of the representation and agreements contained in the application, promised and agreed to pay the plaintiff, or in case she should die before her husband, to pay the sum insured to her heirs, executors, administrators, or assigns, within sixty days after due notice and proof of the death of the person whose life is therein insured.

Process was issued and served and the defendants appeared and pleaded the general issue that they never promised in manner and form as alleged in the declaration, and the issue tendered was joined by the plaintiff. Errors in pleading were waived and the parties filed a stipulation in writing that the issues of fact should be tried by the court without the intervention of a jury, and agreed that every defence admissible under any special plea should be admitted under the general issue. Evidence was introduced on both sides, and the court rendered judgment for the plaintiff in the sum of five thousand and thirteen dollars and twenty-five cents, and the defendants sued out a writ of error and removed the cause into this court.

Most of the difficulty arising in the case proceeds from the failure of the court to comply strictly with the requirements of the act of Congress, which provides that issues of fact in civil cases may be

tried and determined by the court without the intervention of a jury. Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury, but where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. Such ruling if duly presented by a bill of exceptions may be reviewed here, even though the finding is general, but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner.

By the express words of the act the finding may be general or special, but if general it is final and conclusive between the parties, unless the court which tried the case shall grant a new trial or the judgment shall be reversed in the appellate court for some erroneous ruling made in the progress of the trial, which is duly presented by a bill of exceptions. Whether the finding is general or special the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed in this court, and in a case where the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment.

Application for the policy was made by the husband of the plaintiff, since deceased, and he obtained the same for her benefit through the general agents of the insurers. Actual payment of the cash premium was never made by the plaintiff nor by her deceased husband. Nothing of the kind was pretended at the trial, but the plaintiff introduced evidence tending to prove that the agents of the company delivered the policy without complying with that part of their instructions; that they agreed to waive that requirement and to call upon a third person, named by the decedent, for the same whenever they should deem it proper so to do, and that the policy was delivered to the applicant and became operative under that arrangement.

Policies, as the defendants proved, were required to be issued by the officers of the company and could not be legally executed by the ordinary agents. All such agents could do, in the outset, was to prepare the application, have it duly executed, and transmit it to the home office, and it appears that they did so in this case and that they received a policy in return duly executed. Whereupon they inclosed the policy, with the two notes for the credit portion of the premium, to the decedent, who promptly signed the notes and inclosed the same

in a letter addressed by mail to the persons from whom the notes, with the policy, were received.

In their letter to the decedent enclosing the policy the agents say, "the cash payments we will get of Scott when the proper time arrives." They subsequently called upon that person for the cash premium, but he refused to pay it as he had agreed to do with the decedent, and the agents thereupon gave notice of his refusal to the applicant for the policy and requested him to make the payment. He acknowledged the receipt of their letter and promised to procure a draft for the amount and send it to them in a few days, but he did not send the draft, and the agents wrote him again informing him that the draft had never come to hand, and expressing their fears that if the payment was not made soon he would lose his policy, adding that the payment had been delayed so long that he would have to add interest to the premium, amounting to one dollar and thirty-four cents. Payment being still neglected, and the agents having learned from Scott that the person insured was "quite sick," they informed him by letter that his policy was forfeited and enclosed to him the two notes given for the credit portion of the premium, but the letter did not "reach his home" till after his death.

Such agents were instructed not to deliver policies until the whole premium was paid, and were told that if they did the premium would stand charged to them until the same was received by the company or the policy was returned to the office. Evidence to that effect was also given by one of the agents who delivered this policy, but he admitted that it was their custom in some cases not to call for the money at the time from parties with whom they were well acquainted, and when asked on cross examination what they meant by saying, in their letter enclosing the policy to the applicant, that they would get the cash payment of the person named when the proper time arrived, he admitted that they sometimes gave the receipt before they received the money, and that they had confidence in this case that they could get the money on call.

But the payment of the cash premium was not made, and in view of that fact and the other evidence in the case, the defendants requested the court to rule as follows: (1) That the evidence showed that the agents never intended to waive the prepayment of the cash premium, and that the applicant for the policy did not believe that they intended to make any such waiver, and that the defendants, if the court so find, are not liable in this action. (2) That if the court so find, and that the applicant knew that the agents had no authority

to deliver the policy without such payment, then there was no waiver of that requirement and the defendants are entitled to judgment. (3) That if the court believe from the evidence that the authority of the agents was such as is shown in their instructions, then the defendants are not bound by the act of the agents in delivering the policy without such payment, and the plaintiff cannot recover. (4) That the facts given in evidence, as recited, show that there was no waiver of that requirement, as is supposed by the plaintiff. (5) That the facts testified to by the two witnesses examined under the commission, if true, show that the agents of the defendants did not waive the payment of the cash premium.

Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues of fact were tried and determined by the circuit court, and the act of Congress provides that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. 2 Story on Const., Sec. 1,770.

Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law, which intervened in the proceedings. *Parsons vs. Bedford*, 2 Pet., 448. 2 Story on Const., Sec. 1,770.

Matters of fact found by the circuit court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special, nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Tested by these rules, which are believed to be undeniable, it is clear that no one of the said several requests presented by the defendants shows any ground for reversing the judgment, as every one of them assumes as facts matters dependent upon the evidence, and which are not embraced in the findings of the circuit court. All matters of fact must be found by the circuit court and not by the supreme court, as the act of Congress provides that the issues of fact may be tried and determined by the circuit court where the suit is brought. Rejected by the circuit court as the several requests under

consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the circuit court. On the contrary, the complaint of the defendants is that the circuit court improperly found a different state of facts, and gave judgment for the plaintiff. They contend that the circuit court ought to have found the facts to be as assumed by them in their requests, and what they seek to accomplish by the writ of error is to show that the finding of the circuit court is erroneous and to induce this court to set aside that finding, affirm the propositions of fact assumed in their requests, reverse the judgment of the circuit court, and grant a new trial or render judgment in their favor. Enough has already been remarked to show that nothing of the kind can be done, as the act of Congress requires that the facts must be found by the circuit court. *Norris vs. Jackson*, 9 Wall., 127.

Inferences of fact must be drawn by the circuit court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of error. *Tancred vs. Christy*, 12 Me. & Wells., 323.

Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of Congress authorizing the circuit courts to try and determine issues of fact in civil cases, as in the case before the court. What is required is that the findings of the circuit court shall contain the conclusions of fact, or, as the rule is stated in a recent decision of this court, a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest, and it is well settled law that the finding must be sufficient in itself without inferences or comparisons or balancing of testimony or weighing evidence. *Burr vs. Des Moines Co.*, 1 Wall., 102.

Testimony as to a conversation between the agent of the defendants and the person designated by the applicant to pay the cash premium was introduced by the plaintiff, subject to the objection made by the defendants, but it is not necessary to examine that objection, as the testimony was subsequently stricken out at the defendants' request.

Having disposed of the exceptions to the rulings of the court, it only remains to determine whether the facts found are sufficient to support the judgment. Separate findings are much to be preferred in such a case to the form adopted by the circuit court, as the review extends to the inquiry whether the judgment can be supported by the findings. Instead of that, however, the circuit court adopted the

prayer presented by the plaintiff and certified in the record that "the court finds all the facts stated in the above prayer, and orders judgment to be entered for the plaintiff" in the sum therein specified.

Throughout the trial it was conceded by the plaintiff that the cash premium was never paid, but she insisted that the requirement that it should be paid before the delivery of the policy was waived by the general agents of the defendants, and the prayer presented by her counsel embodied most or all of the evidence introduced to prove that theory. Omitting unimportant words it was to the effect following: That if the court shall find that the application was made by the husband of the plaintiff through the general agents of the defendants, and that the defendants thereupon executed the policy and sent it to their general agents, and that the latter, upon the receipt of the policy, forwarded and delivered the same by mail to the applicant, who, in obedience to the directions of the said general agents, executed and remitted to them the premium notes as provided in the policy, and that the person whose life was insured died at the time alleged, whereof the defendants received notice prior to the institution of the suit, and refused to pay the sum insured solely upon the ground that the policy was not in force, and shall further find that said general agents did not demand immediate payment of the cash premium, neither at the time of the application nor at the time the policy was sent to or received by the person whose life was insured, but agreed with him to call upon the person named in the evidence for the same when to them it would seem proper so to do, and that said general agents waived the payment of said cash premium for several months and treated the policy as an executed contract, then the plaintiff is entitled to judgment.

Assume the facts to be as stated in that prayer and found by the circuit court, the court here entertains no doubt that they are sufficient to support the judgment, which is the *only question* raised by any special finding. Beyond all doubt they show a waiver, and it may be proper, in view of the circumstances, to remark that the evidence reported in the record, if it could be re-examined, is even more persuasive and convincing to that effect than the statement of the plaintiff or the finding of the circuit court.

Evidence of the most convincing character is reported showing that it was the custom of the agents to give credit in certain cases to persons with whom they were well acquainted and knew to be responsible, and not to call for the money at the time the policy was delivered; and one of the instructions given to such agents affords

a strong presumption that the custom was known to the company, as the instruction states that agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their account until the premiums are received or the policies are returned to the office. Such evidence, however, cannot be re-examined, as this court is confined to the special finding and the rulings of the circuit court.

Attempt is made in argument to show that general agents have no power to waive such a requirement or to deliver the policy to the insured without first exacting the payment of the cash premium, but the court here, in view of the circumstances of this case, is entirely of a different opinion. *Boehen vs. Ins. Co.*, 35 N. Y., 131.

Where the policy is delivered without requiring payment the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent and the amount is charged to him by the company the transaction is equivalent to payment. *Goit vs. Ins. Co.*, 25 Barb., 189. *Sheldon vs. Atlantic F. & M. Ins. Co.*, 26 N. Y., 460. *Wood vs. Ins. Co.*, 32 N. Y., 619. *Brandon vs. Ins. Co.*, 42 Me., 262. *Trustees vs. Ins. Co.*, 18 Barb., 69. Same case, 19 N. Y., 305.

Premium notes were given in this case, and it must be held, under such circumstances, that the insurance company assumes a reciprocal obligation where there is no evidence to impeach the *bona fides* of the transaction. *Whitaker vs. Ins. Co.*, 29 Barb., 319. *Post vs. Ætna Ins. Co.*, 43 Barb., 351. *Com. M. Ins. Co. vs. Union M. Ins. Co.*, 19 How., 323.

Conditions, it is sometimes said, cannot be waived even by a general agent, but the decisive answer to that suggestion in this case is that the policy, when properly construed, does not contain any absolute condition that it shall not attach or be operative unless the cash premium is first paid by the insured, and in the absence of any such positive condition in the policy it is not necessary to enter upon a discussion of that topic.

Judgment affirmed.

SUPREME COURT OF MICHIGAN.

SECURITY INS. CO., OF NEW YORK, *Pl'ff in Error*, }
vs. }
HARRISON S. FAY, *Def't in Error*.*

The agent of the company, immediately after the fire, without waiting for formal notice from the insured, called for the books and papers for the purpose of making an inventory and ascertaining the amount of goods destroyed and made such an examination, the insured giving him the papers and doing all the agent required. Such acts of the agent constituted a waiver of preliminary notice.

There was no reference in the policy to any adjusting agent, and the presence of a regular adjusting agent was not essential to make the waiver binding.

Where the policy required consent to other insurance to be indorsed thereon, without providing by whom the indorsement was to be made, the general agent by whom the policy was to be countersigned was the proper person to make the indorsement, and absence of the indorsement of such agent must be accounted for to sustain the policy.

In order to bind companies for the unauthorized acts of agents there must be something in the course of business which the party dealing with them has fairly a right to rely on, and there must have been an honest reliance in fact.

Dealings with such agents must be governed by the same rules that are applied to other persons.

Estoppel can never arise by implication alone except from some conduct which induces action in reliance upon it to an extent that renders it fraud to recede from what the party has been induced to expect.

CAMPBELL, Ch. J.

Judgment was rendered against plaintiffs in error on a policy of insurance. The defense, among other things, rested on a forfeiture of the policy by failure to have certain additional insurance consented to by endorsement on the policy, and on a failure to furnish the proofs required by the terms of the policy.

In regard to the latter question, the provisions in the policy do not provide for any forfeiture on account of the failure of the insured to furnish the proofs in the formal manner required, but merely provide that the claim shall not be payable until three several steps are taken. There was evidence, (though conflicting,) from which the jury could have found that Betts, the agent of the company, very soon after the fire, set about examining Fay's books with him and making an inventory, and on the arrival of the agent of another company, the books were taken off by the agents to Betts' house and that they returned the books to Fay after examining them;

* Decision rendered April Term, 1871.

and that the goods saved were removed to another place by the advice of the agents. Betts gave a different account in some important particulars, but the court, upon request of Fay's counsel, charged the jury, that if Betts, immediately after the fire occurred, without waiting for a formal preliminary notice from the plaintiff, called for the books and papers of the plaintiff, for the purpose of making an inventory and ascertaining the amount of goods destroyed, which request was complied with by the plaintiff, and the examination was had of such books and papers by said agent, and all that the agent required was done by the plaintiff, such fact would constitute evidence from which the jury may presume a waiver of the formal proofs, and the presence of a regular adjusting agent was not essential to make the waiver binding.

There was no reference in the policy to any separate adjusting agent, and nothing requiring the proofs to be furnished to such a person. We think the formalities being mostly mere matters of routine, beyond the ascertainment of the facts relating to the circumstances of the fire and amount of the loss, might be waived, and that the case was fairly left to the jury on that point. If they believed a part of the evidence, the course taken, inasmuch as it would to some extent have prevented the insured from making his formal proofs as soon as they might have been furnished otherwise, might readily have been supposed to be a waiver without proof to the contrary; and in the conflict of testimony the facts were with the jury.

Upon the main point of defense the questions involve some complexity. The insurance was for \$3,000. The policy contained, among other clauses of forfeiture, one which declared that "If, without written consent hereon, there is any prior or subsequent insurance—this policy shall be void." This policy was dated September 17, 1866, and renewed September 17, 1867. Up to this latter date there had been no additional insurance. Both policy and renewal contained clauses declaring them invalid unless countersigned by the general agent at Chicago. The local agent's name did not appear on either of them. The policy did not declare who was to sign the consent.

On the 22d of October, 1867, Fay obtained a policy for \$2,000 from the agent of a Detroit company. No consent was obtained in advance, and no notice given of it until December 7th, 1867, when one A. G. Martin, an agent of the plaintiffs in error, residing in another place, wrote upon the policy these words: "Other insurance, to the amount of \$4,000, is hereby permitted. December 7,

1867." This memorandum was not signed by any one. Martin swore he omitted the signature by mistake. There is conflicting evidence as to whether Betts was informed of this additional insurance or consent before the fire. Fay's evidence was that he informed Betts a day or two after the indorsement, and that Betts found fault with it, and said he would like to do his own indorsing, and Fay said Martin told him Betts had no right to do it. There is no further evidence on the subject of consent; but considerable on the question of agency and the power of Martin in the premises.

The questions presented on this part of the case relate largely to the effect of a supposed waiver of the requisite written consent, as well as to the presumable powers of agents to act in such matters. They can best be considered together.

The first thing to be considered is the proper construction of the condition in the policy, and the nature of the consent required by its terms, and then we may properly determine how, if at all, a strict compliance could be dispensed with.

The clause does not refer only to future additional insurances. It applies equally to prior insurances. Had there been any such, a consent to them was required to be written upon the policy; and in that case it would have formed a part of it. The policy was not to be valid unless countersigned by the general agent at Chicago. Upon every sound rule of construction the consent should have been signed by him also, and upon the face of the papers the absence of such signature would have required satisfactory evidence of some state of facts dispensing with it, in order to uphold the policy: The certificate of renewal contains the same guarding clause. The unsigned consent cannot be sustained in the absence of the general agent's signature without distinct proof that it was made by some one who was in fact or by their conduct fairly supposed to be authorized to bind the company in that way, or so recognized and acted upon afterwards as to bind them by some sort of estoppel. No court can have judicial knowledge of the powers of all insurance agents, and in order to bind companies for the unauthorized acts of agents, there must be something in the course of business which the party dealing with them has fairly a right to rely on, and there must have been an honest reliance in fact. In other words, dealings with them must be governed by the same rules applied to other persons.

The condition referred to contemplates that the consent to future insurance shall be given in advance, for the policy becomes void if there is any subsequent insurance without consent. When the

policy was taken out in October in the Detroit company, this policy at once became void, according to our decision in *Western Massachusetts Ins. Co. vs. Roher*, 10 Mich., R. 279. The subsequent written consent was not on its face a consent to a past insurance, but its words import rather a future insurance. If made by a person having authority to waive a forfeiture, it would have no such force, unless made with knowledge of the previous insurance, and with a design to include it in the permission; and if sought to be made valid by any subsequent waiver or estoppel, that also must have been done with full knowledge of all the facts. It is not to be taken for granted that an expired policy would be revived in all cases where an existing one might be modified or allowed to be affected by new insurance elsewhere.

There is some evidence that Martin knew of the October insurance when he signed the consent. There is no evidence tending to show that Betts was informed of that insurance having been obtained before the written consent. And there is no evidence that any agent except local agents could give assent to such additional insurance. Neither is there any evidence that any agent had distinct authority to renew a forfeited policy, unless included in the power to allow further insurance. If it appeared that Fay had had dealings with Martin, as agent for this company in Burr Oak, which the company had acted on and ratified, or that they had held him out to the public as authorized to act there, and Fay had been induced thereby to rely upon his powers, his action to such an extent might stand on a different footing. But in the absence of such facts Fay dealt with him at his peril, and was bound to learn what authority he really possessed. And the defendants in error rely much upon the subsequent action of Betts, who, as representing the company in Burr Oak, and being the person through whom Fay had dealt with them, might be authorized to bind them, except in matters where, by the policy itself or by other notice, his authority was made known to have been limited.

Assuming, then, as we must, that upon the case as it appeared on the trial there was no valid consent until Betts may have so acted as to confer it, the question next arises whether there can be a waiver of the condition requiring written consent, and if so, whether there was any evidence which would authorize the case to go to the jury on that point.

We have held heretofore that a party dealing with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are

known to his principals. We have also held that when, with a knowledge of such facts, the insurers accept premiums and keep them, and issue policies, they cannot insist upon conditions which it would be dishonest to enforce after such action. *Niagara Fire Ins. Co. vs. DeGraff*, 12 Mich. R., 124; *Peoria M. and F. Ins. Co. vs. Hall*, 12 Mich. R., 202; *Peoria Ins. Co. vs. Perkins*, 16 Mich. R., 380; *Ætna Live Stock and Fire Ins. Co. vs. Olmstead*, 21 Mich. R., 246; *N. A. Fire Ins. Co. vs. Throop*, 22 Mich. R.

We have also held that nothing is a waiver of the rights of an insurer that would not, under the same circumstances, be enforced against others; and that it was no waiver of a forfeiture occurring after the date of a policy, to collect a premium note actually earned. *Williams vs. Albany City Insurance Company*, 19 Mich. R., 450.

The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud. There is nothing in this case which tends to establish any such defense. Betts is not shown to have manifested any disposition to ratify Martin's action, and Fay in reply to his objections, told him that Martin said he (Betts) had no authority in the matter. This evidence does not tend to show that any one supposed the written consent was to be waived, and it does not show any willingness in Betts to waive it—if, under such a policy, any mere verbal consent could so operate. No assurance was given to Fay that any waiver would be made, and he asked none. He was bound to know that the policy was forfeited without it, unless he could show Martin's authority. There was no further dealing with him of any sort, and he did nothing further, which they were bound to know or suppose he did in reliance on them, or which they were bound to take notice of. And he did not, so far as appears, even inform Betts of the circumstances and dates of the various insurances, which would have been necessary to make any waiver binding if one had been shown—as none has been. There is an entire absence of any proof tending to create an estoppel. All of the rulings on this hypothesis were therefore open to objection.

We are also of opinion, that under the issues of fact arising under the evidence, the charge asked for—that if there was any attempt to defraud the company by not complying with the conditions of the policy the plaintiff below could not recover—was

one the defendants below had a right to ask. The testimony was before the jury for their action.

These considerations dispose of the principal questions in the case. We also think that under the inquiry in regard to the powers of agents by custom, or of particular agents in fact, to do particular acts, the answers of witnesses negating them were not objectionable.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1870.

In Error to the Circuit Court of the United States, for the District of South Carolina.

THE GERMANIA FIRE INS. CO., THE NIAGARA
FIRE INS. CO., THE HANOVER FIRE INS. CO.
AND THE REPUBLIC FIRE INS. CO., of NEW
YORK, *Plffs in Error*,

vs.

BURWELL E. BOYKIN.*

A general exception to the whole of the judge's charge, without specifying any particular part of the charge or any special proposition of law found in it is insufficient.

If the insured was so insane as to be incapable of making an intelligent statement, that would of itself excuse the conditions of the policy requiring proof of loss.

If the affidavit of an insane man, in his proof of loss, which is sufficient in the information it gives, of the time, nature and amount of loss, contains more, which is the result of insanity, that does not vitiate what is well and truly stated.

Where the companies, by their policies, made themselves each liable separately and severally for one-fourth of any loss that might occur, and no more; it was error for the court to give judgment against them jointly for the full amount, although by consent of counsel the action was brought against them jointly.

The Supreme Court must render such judgment in this case as the Circuit Court should have rendered on the verdict.

*Decision rendered November 27, 1871.

Mr. Justice MILLER delivered the opinion of the Court.

The plaintiffs in error are four insurance companies, who had underwritten a policy of fire insurance in favor of the defendant in error, by which they insured him against loss to the amount of ten thousand dollars, each company making itself separately and severally liable for one-fourth of the loss, if any occurred, and no more.

After loss they were sued in one action, and a joint judgment rendered against them for the full sum of ten thousand dollars, with interest from the time the loss was payable.

In the course of the trial exceptions were taken by the defendant in error to the introduction of testimony, and to the instructions given and refused by the court.

1. The exception as to the introduction of testimony relates to four affidavits which are referred to in the bill of exceptions as exhibit four. There is no such exhibit in the record, nor anything else which can be identified as either of these affidavits. We cannot, therefore, determine whether their admission damaged the defense or not, and the assignment of error based on this exception must be overruled.

2. The assignment which alleges error in the charge of the judge is equally unfortunate. The charge is a very full and elaborate discussion of the law and the facts of the case, and no particular part of the charge, nor any special proposition of law found in it, is excepted to.

We have repeatedly held that a general exception to the whole of such a charge is insufficient

3. The exception to the refusal of the court to charge as requested may, with a little liberality, be held sufficient. The substance of it is this :

The assured having applied to the agent of the insurers to make out proof of loss, an affidavit was made by him, in which, after giving the particulars of the loss, he proceeded further to state that he believed the building had been set on fire by an incendiary; that he had heard of repeated threats of a person whom he named that he would burn the premises, and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover.

When this affidavit was laid before the insurance companies they refused to pay, and notified the insured that they considered the policy void. Testimony was given to show that at the time Boy-

kin made this affidavit he was insane, and, also, that it was procured from him by fraud.

Based on these facts, defendants at the trial asked six instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery.

The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration.

There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature and amount of the loss. Second, if he was so insane as to be incapable of making an intelligent statement, this would of itself excuse that condition of the policy.

It is argued that plaintiff, having averred in his declaration that he did give them this information under oath, he cannot now be permitted to show an excuse by his insanity for not doing it. But as already seen his affidavit does literally prove the allegation, and if it contains something more which was the result of insanity, that does not vitiate what is well and truly stated in the affidavit.

We are of opinion that all these prayers for instruction were properly rejected.

The remaining assignment of error is that the action was sustained and judgment given against all the defendant companies jointly.

We need not stop to inquire whether the action in this form should have been sustained if objection had been made at the proper stage of the suit, for by an express written agreement found in the record, defendants, by their counsel, consented that the action should be brought jointly instead of severally.

As their liability depended on the same evidence and was founded on the same policy, and as their defense rested on the same issues to be supported by the same testimony, it was manifestly for their interest to have but one trial, and no reason is apparent to us why this could not be done by consent.

But the terms of this consent did not authorize the court to render a joint judgment, by which each company would be bound for the whole loss. This was not their contract, and it may be doubted if their counsel could have bound them by such an agreement if they had intended it.

The judgment of the court, therefore, which is against the defendants jointly and not severally for the full amount of the policy, with interest, is erroneous, and must be reversed. But this error does not extend to the verdict. The amended declaration sets forth very distinctly the promises of the defendants as several and not joint, and the verdict of the jury is, "that the said defendants did promise and assume, as the said plaintiff hath alleged, and they assess the damages of the said plaintiff at ten thousand dollars, with interest from the 20th of March, 1867."

The verdict of the jury therefore, finds the amount of plaintiff's damages or loss, and that each of the defendants had promised and assumed to pay one-fourth thereof, which is manifestly a good verdict, responsive to the issues and to the contract of the defendants.

The circuit court ought to have rendered a judgment that plaintiff recover of each of said defendants, severally, a sum which would have been the one-fourth part of the \$10,000, and interest from the time mentioned in the verdict, and a joint judgment against all the defendants for costs.

While we are bound, therefore, to reverse the judgment of that court the foregoing statement indicates very clearly the judgment which this court must render under the twenty-fourth section of the judiciary act. That section enacts that where a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the supreme court shall do the same in reversals therein, except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain; in which case they shall remand the cause for final decision.

As the case before us does not come within the exception above mentioned, it is our duty to render the judgment which we have shown that the circuit court should have rendered.

The process, the pleadings, the trial, and the verdict are without error, and it surely cannot be necessary to set aside this verdict and award a new trial because the judgment which was rendered on that verdict was erroneous.

And this was also the rule by which courts of error were governed at the common law. Indeed, it was for a long time denied that a court of error could award a *venire facias de novo*.

In the case of *Phillips vs. Bury*, reported at great length in Skinner, 447, which was an action in the king's bench and writ of error to the peers, who reversed the judgment below, the case was

carried back and forward several times between the peers and the king's bench on the question of which court should render the judgment on the verdict, and it was finally settled that the house of lords should give the judgment which the king's bench ought to have given, Eyre, C. J., saying that where judgment is upon a verdict, if they reverse a judgment, they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below. So in *Slocumb's Case*, Cro. Car. 462, on a general verdict where judgment was reversed in the king's bench, it was, in the language of the reporter, "agreed by all the court, if the declaration and verdict be good, then judgment ought to be given for plaintiff, whereof Jones at first doubted, but at last agreed thereto, for we are to give such judgment as they ought to have given there."

In 1 Salkeld, 401, it is said: "If judgment be below for plaintiff, and error is brought and that judgment reversed, yet if the record will warrant it the court ought to give a new judgment for the plaintiff," which is precisely the case before us. See also *Butcher vs. Porter*, 1 Shower, 400. And in *Meller vs. Moore*, 1 Bosanquet & Pullor, on the authority of these and other cases, the Court of Exchequer Chamber held that when a judgment is reversed on demurrer in favor of plaintiff, the case is sent down and a writ of inquiry goes, but when it is upon a verdict they should give the same judgment that ought to have been given at first, and that judgment ought to be sent below.

In *Gildart vs. Gladstone*, 12 East., 668, on a case from the common pleas having been reversed on a special verdict, Lord Ellenborough said: The court are bound, *ex-officio*, to give a perfect judgment upon the record before them.

The provisions of our statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subject.

The judgment in this case will be reversed and a judgment certified to the circuit court for plaintiff against each of the defendants for the one-fourth of amount of the plaintiff's damages, including interest, as ascertained by the verdict, and for a joint judgment against them all for the costs in that court.

STATUTE LAWS.

KANSAS.

AN ACT To establish an Insurance Department in the State of Kansas, and to regulate the companies doing business therein.

Be it enacted by the Legislature of the State of Kansas :

ARTICLE 1.—§ 1. That there is hereby established a separate and distinct department, to be known as the Insurance Department, which shall be charged with the execution of all laws now in force, or which shall hereafter be passed, in relation to insurance and insurance companies doing business in the State of Kansas.

§ 2. There shall be appointed by the governor, by and with the advice and consent of the senate (if in session) within ten (10) days after the passage of this act, a chief officer of said department, who shall be styled the Superintendent of Insurance, and shall hold his office for the term of four years, and until his successor is duly appointed and qualified, from the third Monday in February, 1871, and shall receive for his services the sum of three thousand dollars per annum ; *provided*, however, that the person first appointed superintendent under this act shall enter upon the duties of his office within twenty days after his appointment. The person so appointed shall be an elector of this State, and shall, during his term of office, have no official connection with any insurance company, nor be employed by any such company. If this appointment is made after the adjournment of the senate, the governor shall report the name of the appointee to the senate for confirmation within ten days after the commencement of the next session. In case of a vacancy in said office by death, resignation, removal, suspension, or otherwise, the governor shall fill the vacancy and report the name of such appointee to the senate, if in session, and if not, within ten days after the commencement of the next session thereafter ; and such appointee, by and with the advice and consent of the senate, shall hold his office for the unexpired term, and until his successor is duly appointed and qualified.

If at any time the governor shall become satisfied that the superintendent is inefficient, incompetent, or derelict in the discharge of his duties, he is hereby authorized and required by and with the advice and consent of the senate, if it be in session, to remove said superintendent from office, and if the senate be not in session, to suspend him from the discharge of his duties, temporarily filling the vacancy, as hereinbefore provided, and reporting the fact to the senate at its next session thereafter, for its action thereon.

§ 3. Before entering upon the discharge of his duties, the said superintendent shall take an oath or affirmation to support the constitution of the United States, and the constitution of the State of Kansas, and to faithfully and honestly discharge the duties of his said office, and that he is not an officer, agent, employee or stockholder in any insurance company, and shall also give bond to the State of Kansas in the sum of twenty thousand dollars, with not less than two sureties, to be approved by the governor, and filed and recorded with the secretary of State, conditioned for the faithful discharge of the duties of his office. The said superintendent shall have the sole and exclusive charge and control over said insurance department, under the laws relating thereto, and all powers, duty and authority now conferred by law upon the auditor of this State with respect to insurance companies, are hereby transferred to and conferred upon the said superintendent.

§ 4. Said superintendent shall appoint a chief clerk, who shall in no way be interested in any insurance company, except as policy holder, whose appointment shall be evidenced by a certificate thereof, under the official seal of the superintendent, and who shall continue in office during the pleasure of the superintendent, and before entering upon his duties he shall take the oath of office hereinbefore prescribed for the superintendent, and give bond, with two or more sureties, in the sum of ten thousand dollars, to the acceptance of the superintendent, conditioned for the faithful performance of his official duties; and in case of the absence or inability of the superintendent, the said chief clerk shall act as his deputy, and shall possess the powers and perform the duties of the superintendent, and shall receive for his services the sum of \$1,800 per annum. The superintendent shall also have power to employ such other clerks from time to time, as may be necessary to carry on the business of his office with promptness and accuracy; and, whenever necessary for the examination into the business and affairs of any insurance company, may employ one or more skilled and competent persons to make such examination and report thereon. The superintendent shall be authorized to furnish suit-

able rooms at Topeka, and provide them with the necessary office furniture, stationery, and other conveniences for the transaction of the business of his office; and all the salaries, payments, and expenditures for said insurance department, authorized by this act, shall be paid by the treasurer of the state upon the certificate of the superintendent in the same manner as other like expenses; *provided* the amount so paid out shall at no time exceed that collected from the insurance companies and paid into the state treasury as provided in this act.

§ 5. The seal of the superintendent of insurance shall be one inch and three-fourths in diameter, surrounded by the words "Superintendent of Insurance of Kansas," with such device as the Governor and Superintendent may prescribe, a copy of which shall be filed in the office of the secretary of state, and every certificate, assignment or authority executed by said superintendent in pursuance of any authority conferred by law, and sealed with his seal of office, shall be received as evidence, and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged before an officer authorized by law to take the acknowledgment of deeds; and copies of any paper or record in the office of said superintendent, certified by him and authenticated by the said seal, shall in all cases be evidence equally and in like manner as the original.

§ 6. All books and documents, and all other papers whatever, in the office of the auditor and secretary of state, relating to insurance, shall, on demand, be delivered and transferred to the superintendent of insurance, who shall give a receipt for the same, which shall be a full release from all responsibility in connection with such documents, books, and papers; and thereafter such books, papers and documents shall be and remain in the charge and keeping of the said superintendent in his said office.

§ 7. It shall be the duty of the superintendent of insurance, whenever he shall have good reason to suspect the correctness of any annual statement of any insurance company incorporated in this state, or doing business by its agencies in this state, or that the affairs of any company making such statement are in an unsound condition, to make or cause an examination to be made into the affairs of any such insurance company; and it shall be the duty of the officers or agents of any insurance company doing business in this state, to cause their books to be opened for the inspection of said superintendent or the person or persons so appointed, and otherwise to facilitate such examination, so far as it may be in their power so to do.

§ 8. For that purpose, the superintendent, or the person or person[s] so appointed by him, shall have power to examine, under oath, which he or they are hereby empowered to administer, the officers and agents of any company relative to the business of said company; and whenever the superintendent shall deem it for the interest of the public, he shall publish the result of such investigation in some newspaper printed in Topeka, and of general circulation in the state.

§ 9. Whenever it shall appear to the said superintendent from such an examination that the assets of any life insurance company are insufficient to reinsure its outstanding risks as provided by this act; or that the assets of any insurance company other than life, doing business in this state, are reduced more than twenty per cent below the capital stock required by this act, or by its charter, he shall require the officers thereof to direct the stockholders to pay in the amount of such deficiency, within such period as he may designate in such requisition, or in default thereof he shall communicate the fact to the attorney general, whose duty it shall be to commence and prosecute an action in the proper court to dissolve said insurance company, or to enjoin the same from doing or transacting business in this state. Every such action shall be governed by the provisions of article 29 of the code of civil procedure so far as the same are applicable.

§. 10. In case it shall appear to the satisfaction of said court that the assets of said company are not sufficient, as aforesaid, or that the interests of the public so require, the said court shall decree a dissolution of said company and a distribution of its effects, or shall enjoin the same from doing or transacting any business in the state until it shall comply with this act, and be licensed by the superintendent of insurance to resume business. The court may refer the case to a referee, to inquire into and report upon the facts stated therein. After the superintendent shall have issued his requisition as aforesaid, it shall be unlawful for said company to issue any new policies of insurance, or to transact any new business, until the court shall have rendered its decision in the case, and until the superintendent of insurance shall have issued to such company a license, (if said company has not been dissolved,) which license shall be its authority to resume business.

§ 11. Whenever it shall appear to the superintendent of insurance, from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company, partnership or association, not organized under the laws of this state, are in an unsound condition, he shall revoke the authority granted to such

company to do business in this state, and cause a notice thereof to be published in at least one newspaper published in the city of Topeka; and after the publication of such notice, it shall not be lawful for the agents of such company to procure any new applications for insurance or to issue any new policies. The expenses of any examination made under this act shall be paid by the company examined, if in the opinion of the superintendent reasonable cause existed for such examination.

§ 12. Any transfer of the stock of any company organized under the laws of this state, made during the pendency of any such investigation, shall not release the party making the transfer from his liability for losses which may have accrued previous to the transfer.

§ 13. The superintendent shall keep and preserve in a permanent form a full record of his proceedings, including a concise statement of the condition of each company reported, visited, or examined by him. The said superintendent shall annually make a report to the governor of the general conduct and condition of the insurance companies doing business in this state, with such suggestions as he deems expedient, including also the information contained in the statements required of the said companies, and the result of the official valuations of life policies, to be arranged in tabular form, in two separate reports, one pertaining to life insurance companies, and the other to fire and all insurance companies other than life. He shall also report the names and compensation of the clerks employed by him, and the whole amount of income, and the source whence derived, and of the expenses in detail during the year ending upon the thirty-first day of the preceding December. One thousand copies of each of said reports shall be printed and bound for the use of the legislature and superintendent on or before the first day of July in each year.

§ 14. It shall be the duty of the said superintendent once in three years to make or cause to be made, net valuations of all the outstanding policies, additions thereto, unpaid dividends, and all other obligations of every life insurance company transacting business in this state, and for the purpose of such valuations, and for making special examinations of the condition of life insurance companies, as provided in the laws of this state relating to life insurance companies, and for valuing all policies of whatever description, and for any purpose whatever, the rate of interest shall be four and one-half per cent. per annum, and the rate of mortality shall be established by the tables known as the American experience tables: *Provided*, that whenever the laws of any other state or of the

United States shall authorize a valuation of life insurance policies by some designated state officer, according to the same standard as herein provided, or some other standard which will require a reserve not less than the standard herein provided, the valuation made according to the said standard by such officer of the policies and other obligations of any life insurance company not organized under the laws of this state and certified by said officer, may be received as true and correct, and no further valuation of the same shall be required of such company by the superintendent of insurance. The superintendent may, in his discretion, value policies in groups, and use approximate averages for portions of years and otherwise, but he shall in all cases calculate values by net premiums. The superintendent may, in his discretion, vary the above standard of interest and mortality in cases of companies from foreign countries, and in particular cases of invalid lives or other extra hazards.

§ 15. The superintendent shall annually, in September, furnish to the insurance companies doing business in this state, two or more printed copies of the forms of statements required by this act to be made by them, and he may make such changes from time to time, in the form of the same, and such additions thereto, as shall seem to him best adapted to elicit from said companies a true exhibit of their condition in respect to the several points enumerated in the insurance laws of Kansas.

§ 16. All securities deposited, pursuant to the provisions of this act, shall be deposited with the treasurer of state, who, with his sureties, shall be responsible for the safe keeping thereof; and the said treasurer shall give a receipt therefor in duplicate, showing the kind and amount of such securities so deposited, one copy of which shall be filed with the superintendent of insurance; and said treasurer shall only deliver such securities or coupons attached thereto, upon the written order of the superintendent of insurance.

§ 17. There shall be paid to the superintendent of insurance by every insurance company doing business in this State, the following fees, to-wit: For the filing and examination of the charter of any insurance company, and issuing the certificate of authority thereupon, the sum of fifty dollars; for filing the annual statement required, fifty dollars; for each license granted to agents, two dollars; for every copy of a paper filed in his office, the sum or twenty cents per folio; and for affixing the seal of office and certifying any paper, one dollar. There shall be paid also by every life insurance company not organized under the laws of this State, annually, by way of com-

compensation for the valuation of its policies in case no certified valuation of the same has been furnished to the superintendent of insurance, as provided in section thirteen of this act, one cent on every thousand dollars issued by it on lives ; all the aforesaid fees shall be paid by the superintendent into the State treasury for an insurance fund, and shall be used for the purpose of defraying the expenses of the insurance department, and for no other purpose whatsoever. Every insurance company doing business in this State shall, in addition to the fees required by this act, pay into the State treasury for the benefit of the annual school fund the sum of fifty dollars each year. Whenever the existing or future laws of any other State or government shall require insurance companies organized under the laws of this State, applying to do business by agencies in such other State or government, or of the agents thereof any deposit of security in such State for the protection of policy holders therein, or otherwise, or any payment for taxes, fines, penalties, certificates of authority, licenses, fees, or otherwise, greater than the amount required for such purposes from insurance companies of other States by the then existing laws of this State, then, and in every case, all companies of such States or governments establishing agencies in this State, shall make the same deposit, for a like purpose, with the superintendent of insurance of this State, and pay to said superintendent, for taxes, fines, penalties, certificate of authority, licenses, fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such other State or government upon the companies of this State and the agents thereof. All insurance companies, partnerships and associations, organized under any foreign government, engaged in the transaction of the business of insurance in this State, as provided for in this act, shall annually, on or before the first day of March, in each year pay to the superintendent of insurance two per cent. on all premiums received in cash or otherwise, by their attorneys or agents in this State, during the year ending on the preceding thirty-first of December ; which sum shall be paid, in addition to its other license fees, into the State treasury for the insurance fund. In case of neglect or refusal by any company to pay said sum, the superintendent of insurance shall revoke the authority or license granted such company.

§ 18. It shall be unlawful for any person, company or corporation in this State, either to procure, receive or forward applications for insurance in any company or companies not organized under the laws of this State, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized

by such company and licensed by the superintendent of insurance, in conformity to the provisions of this act; and any person violating the provisions of this section shall be liable to a penalty of five hundred dollars for each offense, to be collected as other penalties under this act.

§ 19. Any insurance company not organized under the laws of this State, may appoint one or more general agents in this State, with authority to appoint other agents of said company in this State; a certified copy of such appointment shall be filed with the superintendent of insurance, and agents of such company, appointed by such general agent, shall be held to be the agents of such company as fully, to all intents and purposes, as if they were appointed directly by the company. Agents for any such company in this State may be appointed by the president, vice-president, chief manager or secretary thereof, in writing, with or without the seal of the company; and when so appointed, shall be held [to be] (by) the agents of such company as fully as if appointed by the board of directors or managers in the most formal mode.

§ 20. When any company transacting business of insurance under this act, within the State of Kansas, shall desire to discontinue its business, the superintendent shall, upon application of such company or association, give notice of such intention in a paper published and having general circulation in the county in which said company or its general agency is located, at least once a week for six weeks, the expense of publication to be paid by the State superintendent at the expense of such company. After such publication said superintendent shall deliver up to such company or association the securities held by him belonging to them, on being satisfied by the exhibition of the books and papers of such company or association, and on examination to be made by himself or some competent disinterested person or persons, to be appointed by him, and upon the oath of the president or principal officer, and the secretary or actuary of the same, that all debts, judgments and liabilities of every kind are paid and extinguished that are due or that may become due upon any contract or agreement made with any citizen or resident of the United States. And the said superintendent may also, from time to time, deliver up to such company or association, or its assigns, any portion of said securities, on being satisfied that an equal proportion of the debts and liabilities of every kind that are due or may become due upon any contract or agreement made with any citizen or resident of the United States, by said company or association, has been satisfied; *pro-*

vided, the amount of securities retained by him shall be not less than twice the amount of remaining liabilities.

§ 21. All the provisions of this act relating to insurance companies organized under the laws of any other state of the United States, shall apply to any company organized under the laws of the United States, for any of the purposes specified in this act, and all the provisions of this act relating to agents of companies organized under the laws of any such state shall apply to the agents of such companies organized under the laws of the United States; and any violation of the provisions of this act by any person or agent in the employment of any such company, organized under the laws of the United States, shall subject the offender to the same penalties provided by this act for any violation of its provisions by persons acting for similar companies organized under the laws of other states of the United States.

§ 22. Every violation of the provisions of this act shall subject the party violating the same to a penalty not less than one hundred nor more than five hundred dollars for each violation, which shall be sued for and recovered in the name of the State of Kansas, by the county attorney of the county in which the company is located, or the agent or agents so violating shall reside; and one-half of such penalty, when collected, shall be paid into the treasury of said county, for the use of the county, and the other half to the informer. In case of the non-payment of such penalty, the party so offending shall, moreover, be liable to prosecution in any court of competent jurisdiction, and on conviction thereof, shall be imprisoned for any period not exceeding six months, in the discretion of the court.

§ 23. The provisions of this act shall apply to individuals and partners, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance. It shall be unlawful for any company, corporation or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this act. And any corporation, company or association violating the provisions of this section, and any individual, company, association or corporation aiding in any manner, either as agent or otherwise, in such violation, shall be liable to a penalty of five hundred dollars, to be collected as other penalties under this act.

§ 24. All certificates and licenses granted under this act shall continue in force until the last day of February next after their date, unless suspended or revoked by the superintendent of insurance.

INSURANCE OTHER THAN LIFE.

ARTICLE II. § 25. Hereafter when any number of persons shall associate to form an insurance company for any other purpose than life insurance, and become incorporated in accordance with the provisions of chapter twenty-three, of the general statutes of 1868, relating to private corporations, they shall publish a notice of such intention once in each week, for at least four weeks, in a public newspaper in the county in which such insurance company is proposed to be located, before executing their charter as in said act provided, and every such company heretofore or hereafter organized, shall file with the superintendent of insurance a copy of its charter, duly certified by the secretary of state.

§ 26. No such joint stock company shall hereafter be incorporated with a smaller capital than one hundred thousand dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, except as herein provided.

§ 27. Having filed a copy of its charter as aforesaid, with the superintendent of insurance, the persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they shall deem convenient and proper, and shall keep the same open until the full amount specified in the certificate is subscribed.

§ 28. The affairs of any company organized under the laws of this State, shall be managed by not more than twenty-five nor less than five directors, all of whom shall be stockholders. Within one month after the subscription books shall have been filled, a majority of the subscribers shall hold a meeting for the election of directors, each share entitling the holder thereof to one vote, and the directors then elected shall continue in office for the term of one year, as the by-laws of the company may direct, and until others have been chosen to succeed them in the trust, and have accepted the same.

§ 29. It shall be lawful for any insurance company incorporated under the laws of this State, for any purpose other than life insurance, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on real estate worth fifty per cent. more than the sum loaned thereon over and above all incumbrances, exclusive of buildings, unless such buildings are insured and the policy transferred to said company, and also in the stocks of this State, or stocks or treasury notes of the United States, and also in the stocks and bonds of any county, school district

or incorporated city in this State, authorized to be issued by the legislature, and to lend the same, or any part thereof, on the security of such stocks or bonds, or treasury notes, or upon bonds and mortgages as aforesaid, and to change and reinvest the same as occasion may from time to time require; but any surplus money over and above the capital stock of any such insurance company, may be invested in, or loaned upon, the pledge of the public stock or bonds of the United States, or any one of the States, or the stocks, bonds or other evidences of indebtedness of any solvent dividend paying institutions incorporated under the laws of this State or of the United States; *Provided always*, that the current market value of such stocks, bonds, or other evidences of indebtedness shall be at all times, during the continuance of such loans, at least twenty per cent. more than the sum loaned thereon.

§ 30. Upon the complying with the foregoing provisions by any such insurance company, the superintendent of insurance shall cause an examination to be made, either by himself or some disinterested person, specially appointed by him for that purpose, who shall certify under oath that the capital herein required of the company named, according to the nature of the business proposed to be transacted by such company, has been paid in and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the twenty-ninth section in this act, in an amount not less than one hundred thousand dollars. Such certificates shall be filed in the office of said superintendent, who shall thereupon deliver to such company a certified certificate, which, on being recorded in the office of the register of deeds of the county where the company is to be located, in a book provided for that purpose, shall be their authority to commence business and issue policies; and such certified copy of said certificate may be used in evidence for or against said company, with the same effect as the original.

§ 31. It shall be lawful for any such company organized under the laws of this State, first, to insure houses, buildings, and all other kinds of property, against loss or damage by fire and lightning in and out of the State; and to make all kinds of insurance on goods, merchandise and other property, in the course of transportation, whether on land or water, or on any vessel or boat, wherever the same may be; second, to make insurance on the health of individuals, and against personal injury, disablement or death, resulting from traveling, or general accidents by land or water; third, to insure horses, cattle and other live stock against loss or damage by accident, theft or death, or any unknown or contingent event whatever which may

be the subject of legal insurance ; and generally to do and to perform all other matters and things proper to promote these objects ; *provided*, that no company shall be organized to issue policies of insurance for more than one of the above three mentioned purposes, and no company that shall have been organized for either one of said purposes shall issue policies of insurance for any other, and no insurance company transacting business in this State shall expose itself to loss, on any one risk or hazard, to an amount exceeding five per cent. on its paid up capital, unless the excess shall be reinsured by the same in some other good and reliable company.

§ 32. The annual meeting for the election of directors shall be holden at such time and place as the by-laws of the company may direct, except as provided in section 21 of chapter 23 of the general laws of 1868 aforesaid, and the directors chosen at any such annual or special meeting shall continue in office until the next annual meeting, and until their successors are duly elected and qualified.

§ 33. The directors shall elect, by ballot, a president, vice-president, secretary, treasurer, and such other officers as they shall prescribe in their by-laws, and the board of directors, or a majority of them, when convened at the office of the company, shall be competent to fill any vacancy that exists among its officers or board of directors. They shall also have power to appoint any agents necessary for transacting the business of the company, paying such salaries and taking such securities as they may judge reasonable ; they may ordain and establish by-laws and regulations, not inconsistent with this act, or with the constitution and laws of this State and of the United States, as shall appear to them necessary for regulating and conducting the business of the company ; and it shall be their duty to keep full and correct entries of their transactions, which shall at all times be open to the inspection of the stockholders.

§ 34. All policies or contracts of insurance made or entered into by any company organized under the laws of this state may be made either with or without the seal thereof ; they shall be subscribed by the president or such other officer as may be designated in their by-laws for that purpose, and shall be attested by the secretary, and, being so subscribed and attested, they shall be obligatory on the company.

§ 35. Transfers of stock may be made by any shareholder, or his legal representatives, subject to such restrictions as the directors shall, from time to time, make and establish in their by-laws, except as provided in section twelve of this act.

§ 36. Whenever any company, heretofore or hereafter organized under the laws of the State of Kansas, shall increase the amount of its capital, as provided by section 14, of chapter 28 of the general laws of 1868, it shall file with the superintendent of insurance a certified copy of the certificate so filed with the Secretary of State, and thereafter such company shall be entitled to have the increased amount of capital fixed by said certificate, and the examination of securities composing the capital stock thus increased, shall be made in the same manner as is provided in section thirty of this act for capital stock originally paid in.

§ 37. It shall not be lawful for the directors, trustees, managers or officers of any insurance company other than life, organized under any of the laws of this State, directly or indirectly, to make or pay any dividend, or pay any interest, bonus or other allowance in lieu of dividends except from surplus profits arising from their business; and in estimating such profits there shall be reserved therefrom a sum equal to forty per cent. of the amount received for premiums on unexpired risks and policies, which shall be held to be the amount of unearned premiums, and shall be held and regarded as an absolute liability of the company. And there shall also be reserved all interest due or accrued and unpaid, and the amount of all bonds, mortgages, notes, stocks, book accounts and judgments due to or held by the company, on which no part of the principal or interest shall have been paid during the year previous. And any division or payment made contrary to the provisions of this section, shall subject the company making the same to a forfeiture of its charter.

§ 38. No company organized under the laws of this State shall purchase, hold or convey real estate, excepting for the purposes and in the manner herein set forth, to wit:

First, Such as shall be requisite for its convenient accommodation in the transaction of its business; or

Second, Such as shall have been mortgaged to it in good faith, by way of security for loans previously contracted or for money due; or

Third, Such as shall have been conveyed to it in satisfaction of debts previously contracted in their legitimate business, or for money due; or

Fourth, Such as shall have been purchased at sales upon judgment, decrees, or mortgages obtained or made for such debts; and it shall not be lawful for any such company to purchase, hold or convey real estate in any other case, or for any other purpose; and

all such real estate as may be required as aforesaid, and which shall not be necessary for the accommodation of such company in the transaction of its business, shall be sold and disposed of within five years after such company shall have acquired title thereto, unless the company shall procure a certificate from the superintendent of insurance that the interests of the company will suffer materially by a forced sale thereof, in which event the sale may be postponed for such period as the said superintendent shall direct in said certificate.

§ 39. It shall be the duty of the president, or vice-president and secretary, of each insurance company organized or incorporated under the law of this State, annually, on the first day of January, or within two months thereafter, to prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form, namely:

First, The amount of the capital stock of the company.

Second, The property or assets held by the company, specifying:

1. The value, or as nearly as may be, of the real estate held by such company.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, on real estate, worth double the amount of all incumbrances on which there shall be less than one year's interest due or owing.

5. The amount of loans on which interest shall not have been paid within one year previous to such statement.

6. The amount due the company on which judgments have been obtained.

7. The amount of stocks of this State, United States, of any incorporated city of this State, and of any other stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock.

8. The amount of stocks held thereby as collateral security for loans, with the amount loaned on each kind of stock, its par value and market value.

9. The amount of assessment on stock, paid and unpaid.

10. The amount of interest actually due and unpaid.

11. The number of policies in force.
12. The amount insured thereby.
13. The amount of premiums received thereon.

Third, The liabilities of such company, specifying :

1. The amount of losses due and yet unpaid.
2. The amount of claims for losses resisted by the company.
3. The amount of losses incurred during the year, including those claimed and not yet due, and of those reported to the company upon which no action has been taken.
4. The amount of dividends declared and due, and remaining unpaid.
5. The amount of dividends, either cash or scrip, declared and not yet due.
6. The amount of money borrowed and security given for the payment thereof.
7. The amount of all other existing claims against the company.

Fourth, The income of the company during the preceding year specifying :

1. The amount of cash premiums received.
2. The amount of notes received for premiums.
3. The amount of interest money received.
4. The amount of income received from other sources.

Fifth, The expenditures during the preceding year, specifying :

1. The amount of losses paid during the year, stating how much of the same accrued prior and now much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement :
2. The amount of dividends paid during the year.
3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.
4. The amount of all other payments and expenditures.

§ 40. Every insurance company organized under any law of this State, failing to make and deposit such statement, or to reply to any inquiry of the said superintendent, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that such company shall continue thereafter to transact any business of insurance ; and in the annual report required to be made by section thirteen of this act, said superintendent shall state what companies have, and what companies have not, complied with the foregoing section, and he shall also make such suggestions as to the condition and management of any company or companies as he shall deem best.

§ 41. It shall not be lawful for any insurance company, association or partnership, organized or associated under the laws of any other State of the United States, or any foreign government, for any of the purposes mentioned in this act, directly or indirectly, to transact any business of insurance in this State without first procuring from the superintendent of insurance a certificate of authority so to do; stating, also, that said company has complied with all the requisitions of this act applicable to such company; nor shall it be lawful for any insurance company, association or partnership mentioned in this section, directly or indirectly, to take risks or transact any business of insurance in this State unless possessed of the amount of actual capital required of similar companies organized under the laws of this State. Every such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall file with the superintendent a written instrument, duly signed and sealed, authorizing any agent of such company in this State, to acknowledge service of process for and in behalf of such company in this State, and consenting that service of process, mesne or final, upon any such agent shall be taken and held to be as valid as if served upon the company according to the laws of this or any other State or country, and waiving all claim or right of error by reason of such acknowledgment or service; and consenting, also, that if said company shall cease to do business in this State, or any county thereof, where it had previously transacted insurance business according to law, and have any of its policies outstanding in the hands of any resident of this State, suit may be brought thereon in the county where the property insured was situated, or where the same was insured, and that service of process made therein by the sheriff of said county, by sending a copy thereof by mail addressed to the company at the place of its principal office when it ceased to do business as aforesaid, at least thirty days prior to taking judgment in said suit, shall be as valid as if personally made upon said company according to the laws of this or any other State or government: *Provided*, that the sheriff's return shall show the time and manner of such service, and every such company shall also file a certified copy of their charter, or deed of settlement, with said superintendent, together with a statement, under the oath of the president or vice-president, or other chief officer, and the secretary of the company, for which he or they may act, stating the name of the company and the place where located; the amount of its capital, with a detailed statement of the facts and items required from companies organized under the laws of this State, as per sections thirty-nine and forty of this act; also a copy of the last annual report,

if any was made, under any law of the State by which such company was incorporated.

§ 42. Any company heretofore organized under any law of this State, for any of the purposes mentioned in this act, which has taken notes or obligations of its stockholders for any portion or portions of the amount subscribed by them to its capital stock, shall retain all dividends declared to such stockholders, their heirs or assigns, and apply the same as a credit upon such stock notes or unpaid subscription, until such notes or unpaid subscriptions shall be fully paid; and the whole amount now or hereafter payable to any such company on stock, notes, obligations, or unpaid subscriptions shall be invested by said company in the manner required by the twenty-ninth section of this act.

§ 43. All insurance companies heretofore organized under any law of this State shall be allowed one year from the last day of February, A. D. 1871, to comply with the foregoing sections of this act.

[*To be continued in next number.*]

MISCELLANEOUS.

THE INSURANCE CONVENTION.

The Convention of Insurance Superintendents and delegates met in New York on the 18th of October, according to adjournment in May last. Twenty-nine states were represented in the convention. The Governors of several states having no Insurance departments or Bureaus appointed delegates.

The first meeting in May was the result of a circular letter addressed by Superintendent Miller of New York to the Insurance Superintendents and Officers of the several states, inviting them to meet in New York City for the purpose of comparing views, and, if possible, of adopting such measures as the common interests of insurance demand. The Superintendents and officers of about twenty states responded to the call either in person or by delegates. The president of the convention, Hon. George W. Miller, Insurance Commissioner of New York, in his opening address thus briefly indicated the subjects which might properly come before it:

"These subjects, I may say, have presented themselves to my mind under two classes: First. Those which are now or may be, substantially, matters resting within the discretionary powers of the officers of the several states having charge of insurance interests, such as the forms of annual statements; the credit to be given to official certificates; the adoption, if practicable, of some insurance nomenclature designating, so as to be universally understood, the various forms of policies, etc., etc., by certain names or terms. Second. Those matters which are of a legislative character. With no power, of course, to control legislation; yet it would seem that an expression of any well-considered views or recommendations upon subjects which have been deliberately considered and discussed by those familiar with the working of the system to be effected and arrived at with any reasonable unanimity, must have some effect with the Legislatures of the states. Of the matters to be affected by legislation it would seem that we might profitably consider 1. The question of the possibility of the

adoption of a uniform standard or system of computing the reserve or policy-liabilities of the life, fire and marine companies.

2. The subject of deposits to be made by companies in the states.

3. Taxation. 4. Investments. 5. Dividends, particularly in life companies, and upon capital stock when a portion of the capital is required to make up the reserve. 6. What to be considered assets, particularly in life companies. 7. How to bring about generally the broadest uniformity, simplicity, security and reciprocity."

Some apprehensions had been felt, by those interested, in the earlier stages of the movement that difficulties might arise from narrow views and sectional prejudices; but the spirit of the meeting was excellent and the event proved the willingness of those present to forget mere personal and local considerations, and an earnest desire to act together for the general interests of the whole country. The meetings of the Convention continued for nine days, and many important subjects were brought before it in various papers and addresses. After taking measures for a fuller representation, and for further discussion, at its next meeting, of the subjects already presented, the Convention adjourned to the 18th of October.

This convention is one of the most important events connected with the history of insurance in our country. Owing to its peculiar character and rapid expansion, as well as to the complicated relations of our state and national governments, the business of insurance has not only suffered from the want of proper governmental regulations, but has been subjected to great hardships and inconveniences from unwise and unjust laws, and from the rivalries and jealousies of companies. Each state has enacted laws for regulating the business of its own companies and of those from other states, in ignorance of the whole subject or upon the narrow basis of special and sectional interests, or has left its citizens to the mercy of fraudulent and unprincipled corporations at home and abroad, by neglecting the subject altogether. Superintendents and Commissioners have endeavored, each one for himself, by independent and often conflicting methods, to solve novel and perplexing questions, and that, frequently, to the great and needless trouble and expense of both the insurer and insured. The discussions and deliberations of intelligent men to whom the interests of insurance are, to so great an extent, entrusted, and who, by their positions in all parts of the country, have so great a power in advising and influencing legislation, must be of the greatest utility.

The New York *Tribune* in speaking of the session that has just closed, remarks as follows:

"The work accomplished at this session has been: 1. The perfection and final adoption of uniform blanks for the annual returns required by all the States of fire, life and marine insurance companies; 2. The adoption of the uniform rate of four and a half per cent interest, and the American experience table of mortality, as the basis for calculation of policy reserves; 3. The agreement upon a liberal policy toward companies in temporarily embarrassed circumstances; 4. The establishment of much needed precautions against bogus insurance speculations; 5. A mutual agreement to accept certificates from each other as to the solvency and regularity of companies, in lieu of requiring, as heretofore, special deposits in each State, and special returns from the companies to all the State officials; 6. The permanent organization of their body as the "National Insurance Convention of the United States," with permanent officers, a bureau in this city, and annual meetings; 7. The framing and adoption, after full debate, of a General Insurance Statute, to be recommended to the Legislatures of all the States in place of existing crude and conflicting laws. Nothing has been hastily done, no private speculation has been subserved, no concession of principle made to local prejudice; but the proceedings have been characterized by method, deliberation, and a conscientious regard for the public interest.

The session has in fact proved, as we anticipated, one of the most important business meetings ever held in this or any other country, and its effects should be felt in the future, in wiser legislation, greater restraint upon illegitimate insurance speculation, more active promotion of sound and well conducted enterprises, and far greater protection to the policy holder."

After a session of ten days, the Convention adjourned to meet in New York City, on the third Monday in October, 1872. At a future time we shall notice the draft for a general Insurance Law, adopted by the Convention.

CONSTITUTION AND OFFICERS OF THE INSURANCE CONVENTION.

CONSTITUTION.

ART. I.—An association by the name of the National Insurance Convention of the United States is hereby formed by the officers having charge of the insurance departments of their respective

states, for the purpose of consultation on matters pertaining to their general superintendency.

II.—In each state where no such department exists, the governor shall have the right to appoint a member, provided that no member shall be connected with any insurance company as officer, agent, or otherwise.

III.—The state officers in charge of insurance affairs shall also have the right to depute a person eligible under the foregoing rule to represent them in the event of their not being able to personally be present at any meeting.

IV.—There shall be only one member from each state.

V.—The officers shall be a president, vice-president, secretary, and executive committee of five, of which the president and secretary shall be members *ex-officio*; and all shall be chosen by ballot at each annual meeting, and hold office until others are elected.

VI.—It shall be the duty of the president to preside at all meetings of the convention; or, in case of his absence, such duty shall devolve upon the vice-president.

It shall be the duty of the secretary to keep the records of the convention, conduct its correspondence, supervise the printing of its proceedings, and, generally to attend to and promote the interests of a more efficient and uniform system of governmental insurance supervision in the United States. The secretary shall devote himself to these matters in the interim between the annual sessions of the convention, and receive an annual salary to be fixed by the executive committee.

The executive committee shall have the general oversight and direction of affairs, and shall make proper general arrangements for facilitating the work of the convention; and in case of a vacancy in the offices of president and vice-president, shall elect a temporary president.

VII.—The annual meeting shall be held in the city of New York, on the third Monday in October.

VIII.—The general rules for the government of the association at its meetings shall be those ordinarily adopted by deliberative assemblies, and each state and district shall have one vote.

IX.—These rules may be amended or annulled, and new ones adopted at any meeting of the convention.

The permanent officers of the convention for the coming year are:

President—George W. Miller, of New York.

Vice-President—Elywelyn Breese, of Wisconsin.

Secretary—Henry S. Olcott, of New York.

Executive Committee—Julius L. Clarke, of Massachusetts; G. W. Smith, of Kentucky; J. F. Hartranft, of Pennsylvania; Samuel H. Row, of Michigan, and James Williams, of Ohio.

THE GREAT FIRE IN CHICAGO.

The daily newspapers and numerous journals and books have already given the public full details of the great fire in Chicago, which

in its extent and destructiveness will be recorded as the greatest fire of modern times.

The fire originated at about half past nine o'clock, on Sunday evening, October 8th, near the corner of Dekoven and Jefferson streets, in the western division of the city. One Mrs. Leary had taken a kerosene lamp to her barn and was feeding her cow, when the cow kicked the lamp over, setting fire to the hay and straw, which was quickly communicated to the adjoining buildings. The autumn had been remarkably dry, and all combustible material in the city was in the most inflammable condition. An extensive storm reaching over all the Lakes was prevailing at the time and the wind was blowing a gale from the southwest. The fire department were almost exhausted by their exertions in subduing an extensive fire the preceding night. Before any one was aware, the fire had gained such headway among the wooden buildings in that locality, as to baffle all subsequent efforts to extinguish it or to arrest its progress. The conflagration raged unchecked for thirty-six hours until about ten o'clock on Thursday morning, when it reached the northern limits of the city, having twice crossed the river in its devastating course.

In the western division, where the fire originated, about 19½ acres were burned over, including 16 acres laid waste by the fire of the preceding night. This district contained about 500 buildings, mostly of the poorer class, including the dwellings of about 2,250 persons. In the southern division, the number of acres burned over was about 460. This constituted by far the most valuable portion of the city, and contained the greater part of the costly and magnificent buildings. All the large wholesale stores; the daily and weekly newspaper offices; the principal insurance, lawyers' and brokers' offices; the custom-house, court-house, chamber of commerce, and the principal railroad depots, were located in this district. About 3,650 buildings, including 1,600 stores, 28 hotels, 60 manufacturing establishments, and the homes of 21,800 people, were destroyed in this division. In the northern division about 1,470 acres were burned over and 13,300 buildings destroyed, including more than 600 stores, 100 manufacturing establishments, and the homes of 74,450 people.

The total area burned over comprises a territory about three miles long by one mile and a half broad, and containing 2,124 acres, or nearly three and one-third square miles. It has been estimated that this area included about 73 miles of streets, and that 17,450 buildings were destroyed, and 98,500 people left homeless. A writer in the *Lakeside Monthly* makes the following estimate of the total loss by the fire.

"On buildings, etc.....	\$ 52,000,000
On business property, besides buildings...	85,000,000
On personal effects.....	59,000,000
Total burned.....	\$196,000,000

"On this there was a salvage of about \$4,000,000 in foundation and bricks available for building, making the actual loss \$192,000,000. The assessed value of the land in the city, just previous to the fire, was \$176,931,900, which was about 60 per cent. of the actual cash value. Hence the real value of the land within the city limits was \$294,836,000. On this we estimate an average depreciation of about thirty per cent. since the fire, though much of this can be but temporary. This gives a loss of \$88,000,000 on the selling value of real estate in consequence of the fire. Even yet the total of loss is not complete. We must allow for the interruption of business and manufacturing operations. This would average about six weeks, or one-eighth part of the whole year. We estimate that the fire diminished the receipts of the city to the extent of \$50,000,000 worth of goods, which interrupted business to the extent of \$125,000,000 worth of trading, at wholesale and retail. The very moderate estimate of eight per cent. profit would give a further loss of \$10,000,000, and we shall then have the following as the exhibit:

"On property burned up.....	\$192,000,000
On depreciation of real estate.....	88,000,000
On interruption to business.....	10,000,000
Grand total.....	\$290,000,000

"We estimate the value of property in the city, the day before the fire, real and personal, taxed and untaxed, at \$520,000,000. The loss by the fire was therefore nearly forty-seven per cent. of the whole of the property owned in Chicago."

CASES REPORTED.

This number of the JOURNAL contains a full report of the decisions in six insurance cases.

The case of *Killips vs. The Putnam Fire Ins. Co.*, of Hartford, Conn., decided in the Supreme Court of Wisconsin, was a suit for \$1,320 on a policy upon buildings and personal property. The questions arising in the case relate to proofs of loss, notice to

agents and delays caused to the insured, in the prosecution of his claims, by the acts of the company's agent. The court held that where the company considers the proofs of loss unsatisfactory, it is bound to notify the insured of the fact, and that the burden of proof is on the company to show such notice, and that having failed to give the notice it had waived all defects. Where there are no restrictions in the policy as to the time of rendering the proofs, the court holds that they are to be rendered within reasonable time. The case of *Miner vs. the Phoenix Ins. Co.*, reported in the JOURNAL p. 41 is affirmed, and notice of the loss to the local agent is declared to be notice to the company, and verbal notice is held to be sufficient. A consent by the agent that the certificate in the proofs of loss might be made by another justice than the one provided in the policy, is considered binding upon the company. The agent of the company wrote to the insured that the proofs of loss were quite defective, without indicating the defects, and saying that he would soon call on the assured. This is held to be sufficient cause for delay, and the time lost on account of this delay is deducted from that within which the right of action was limited by the policy. The court holds that the same force and effect is to be given to the verdict of the jury, where no instructions were given, as it would have, had the jury been correctly instructed. The course pursued by the agent of the company is commented upon by the judge. The judgment of the court below for the plaintiff was affirmed.

In *Hibbard et al. vs. The Hartford Fire Ins. Co.*, decided in the Supreme Court of Iowa, the insurance was for the amount of \$2,800 on a stock of hardware and tinware. Two policies were issued in different companies, each of which contained conditions against prior and subsequent insurance, and several interesting and difficult questions arose upon the effect of these provisions and also in regard to the ownership, under the statute, of property covered by chattel mortgage. The court held that another policy did not constitute a breach of conditions against other insurance unless it was capable of being enforced; that a receipt given by the agent of a company for premiums paid, and containing a promise that a policy should be issued, raised a contract similar to that contained in the policies commonly issued by the company; and that a statement made under oath by the insured in his proofs of loss that there was insurance in another company did not estop him from showing that the insurance was invalid. The judgment of the court below in favor of the plaintiffs was affirmed. There is an

able dissenting opinion in the case. The digest of this case will appear in the next number of the JOURNAL.

The Germania Fire Ins. Co. vs. Curran, Adm'x, is a case from the Supreme Court of Kansas. The suit was originally brought on a policy for an insurance of \$150 on a dwelling house. Most of the points raised relate to questions of practice. The court held that the company was estopped from saying that it was doing business in the State contrary to the laws of the State; that the notice of loss, which the policy stipulated should be given through the general agent, at New York, was sufficient, if the local agent, acting upon information given by the insured, communicated the intelligence through the general agent; and that the statement, made under oath, by the plaintiff, in an examination by the attorney of the company, that she had sold the property before the loss did not estop her from denying the sale. The judgment given for the plaintiff, in the court below, was affirmed.

In *The Brooklyn Life Ins. Co. vs. Miller*, the United States Supreme Court decided that where the general agents delivered a policy, receiving premium notes, and agreeing to call upon another person for the cash part of the premium, waiving the payment several months, and treating the policy as an executed contract, such acts of the agents constituted a waiver of payment, on the part of the company; that where a policy is delivered without requiring payment, the presumption is that a credit is intended, and that where a credit is intended the policy is valid, though the premium was not paid at the time the policy was delivered; and that where premium notes are given, and there is no evidence to impeach the *bona fides* of the transaction, the company must be held to assume a reciprocal obligation. Several interesting questions of practice arose in regard to the findings of the Circuit Court, where a jury is waived, and in regard to the re-examination and review of matters of fact in such cases by the Supreme Court. The judgment of the Circuit Court in favor of the defendant in error and against the company was affirmed. The digest of this case will appear in the next number.

The decision in the *Security Ins. Co., of New York, vs. Fay* is by the Supreme Court of Michigan. The court held that the act of the agent immediately after the fire, in calling for the books and papers for the purpose of making an inventory, the insured giving him the papers and doing all he required, constituted a waiver of preliminary notice, and that, as no reference was made in the policy to an adjusting agent, the presence of a regular adjusting

agent was not necessary. The court also hold that in order to bind companies for the unauthorized acts of their agents, there must be something in the course of business which the party dealing with them has fairly a right to rely on, and that there must be an honest reliance in fact, and that dealings with insurance agents must be governed by the same rules that are applied to other persons. The judgment of the court below for the defendant in error, and against the company, was reversed, and a new trial granted.

The Germania Fire Ins. Co. et al. vs. Boykin, was taken to the Supreme Court of the United States on a writ of error from the District of South Carolina. There was evidence that the insured was insane. In his proofs of loss he stated that he believed the building was set on fire, and that he had procured the insurance on account of repeated threats he had heard by a certain person that he would burn the premises. The company claimed that they had right to proofs of loss by an intelligent being; that if plaintiff was insane no such proofs had been given, and that if he was sane his affidavit showed such fraud as to defeat recovery. The court held that the first proposition was too repugnant to justice and humanity to merit serious consideration; that if he was so insane as to be incapable of making an intelligent statement, that would of itself excuse the condition of the policy; that whether he was insane or not the affidavit was sufficient in the information it conveyed of the time, nature and amount of the loss, and that if the affidavit contained something more that was the result of insanity, that did not vitiate what was well and truly stated. The companies by their policy made themselves each liable separately and severally for one fourth of any loss that might occur, and no more. The Circuit Court gave judgment against them jointly for the full amount, which is decided to be error. The Supreme Court reversed the judgment of the Circuit Court, and gave judgment against each company for one-fourth the amount, with joint judgment against all for costs. The digest in this case will also appear in the next number.

INSURANCE LEGISLATION.

Kansas.—We publish this month Article I. and II. of the Insurance Law of Kansas, approved March 1st, 1871. In our next number we shall give the remainder of the act—Article III., Life Insurance. The act is quite long, consisting of eighty-one sections. In our next number we shall give the substance of the law in a condensed form.

BOOKS RECEIVED.

THE LAW OF LIFE INSURANCE; with Chapters upon Accident and Guarantee Insurance. By Geo. Bliss, Jr., Counsellor at Law: Baker, Voorhis & Co., New York, 1872.

CINCINNATI SUPERIOR COURT REPORTER, Vol. 1, Numbers 9 and 10. Edited by Chas. P. Taft & Bellamy Storer, Jr., of the Cincinnati Bar. Robert Clarke & Co., Cincinnati, 1871.

We are under obligations to Jno. F. Toby, State Reporter of the Supreme Court of Rhode Island, for Index and Digest to decisions rendered by the Supreme Court of that State since the publication of the last volume of the Reports. Also to Hon. Albert W. Paine, Insurance commissioner of Maine, and to Hon. Gustavus W. Smith, Insurance Commissioner of Kentucky, for volumes of their Reports, and to Henry S. Olcott, Esq., Secretary of the Insurance Convention, for copies of Draft of a General Insurance Law adopted by the Convention at its last session.

SUIT AGAINST THE LIFE ASSOCIATION OF AMERICA.—Davis R. Booghor, Esq., a trustee of the Life Association of America, and one of the oldest policy holders in the company, has brought suit, for himself and others, in the St. Louis Circuit Court, against the officers and managers of the company, and also against J. P. Thompson. In his bill he charges that the managers and directors of the Association have entered into a secret combination and conspiracy to defraud the policy holders of the company. The bill sets forth that in 1869 eleven policies, called "investment endowment policies," for \$10,000 each, were issued to members of the board of directors, or to others in their interest, and that these policies were made assignable, without notice, in order to enable the holders to conceal the fraud and avoid detection; that they were ostensibly issued on the paid up or cash plan, but that only ten per cent. was, in fact, paid in, and that it was understood and intended that fraudulent dividends, should pay off the remainder, which was secured by notes and mortgages on wild lands outside the State; that the directors pretended to call in and annul these policies, but, in fact, only substituted another form of policy, of the same effect, in their place. These policies are set forth in full in the bill, and certain officers and directors are charged by name with holding them. The bill also charges that the books of the Association are fraudulently kept, so as to make the "miscellaneous account" larger than it really is, and that fraudulent entries are made, and items doubly and trebly

charged. It also states that on the 12th of August, 1870, the board of managers adopted what they call "the low cash rates," and under the pretense that one J. P. Thompson, a man in their employ, had invented said table of rates, and was entitled to a large compensation therefor, voted him twenty-five per cent. of the amount thereby saved to the Association for the period of five years, and that by this device large sums of money have been paid to the said Thompson and others named in the bill, and that at least \$100,000 will be thus wrongfully abstracted by the defendants unless they are restrained by the court. The resolutions of the executive committee voting this amount to Thompson are given in full. It is further charged that the board have paid extravagant sums as salaries to themselves and others, and that Hon. Wm. Barnes, of New York, is paid \$20,000 per annum as consulting counsel and actuary. The bill also charges the managers with attempting to secure the passage, last winter, of a bill known as "House Bill No. 157," in the Legislature of Missouri, by which under forms of law they intended to perpetrate enormous frauds upon the policy holders of the Association.

The bill is quite full and explicit, and in conclusion prays for an investigation of the charges made, and that if they are found to be true the defendants be held to account for the moneys fraudulently appropriated; that said investment endowment policies be declared null and void; that the contract with J. P. Thompson be cancelled and the moneys received by himself and others be refunded, and that a full account of the receipts and disbursements of funds, since the organization of the Association, be made, and that said managers and officers be removed from the exercise of authority in the management of the business and affairs of the Association.

CODIFYING COMMISSIONS.— The following States have codifying Commissions at work upon their laws: California, Florida, Georgia, North Carolina, Pennsylvania, Tennessee, Wisconsin, Illinois, Iowa, Michigan, Mississippi, New York, South Carolina and West Virginia. Thus it will be seen that the matter of simplifying the laws and condensing statutes is becoming general.

—*Western Jurist.*

HON. THOMAS A. R. NELSON has resigned his seat as Judge of the Supreme Court of Tennessee.

Numbers 4 and 5 of the First Volume of the INSURANCE LAW JOURNAL were never published, but the matter intended for them found its way into subsequent issues. There is an awkward gap in the paging, but there is no essential loss ; the hiatus being a mechanical one and nothing more.

THE INSURANCE LAW JOURNAL.

VOL. I.

FEBRUARY, 1872.

No. 6

DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1871.

From certified transcripts in our possession.

AGENT.

§ 102. MARINE—*Knowledge of*.—A policy was issued June 7th, on a quantity of dried fruit, lost or not lost, shipped on the propeller Wabash, at Cleveland, to the insured at Chicago, June 3d. The propeller was sunk on the night of June 5th, by a collision. The insurance was procured from Atkins, an agent of the company, by one Stewart, who, on the morning of the same day, had applied to Bruce, another agent of the company, who declined to take it, telling him the Wabash had sunk, and that she was probably the vessel that had the fruit on board. Atkins did not know the Wabash had sunk at the time Stewart applied to him for the insurance, nor did Stewart communicate that fact to him. *Held*, that "Atkins being the particular agent of the company through whom the insurance was effected, he was the person who should have

had the information in question," and that "information at the office of the company was by no means the same as information to him, or in the language of the instruction, to the 'defendant' "—[the company.]

*Merchants Ins. Co., of Chicago, vs. Paige, et. al.**

Rep'd Jour'l p. 413.

ILL. S. C.

CONSTRUCTION.

§ 103. MARINE—*Policy*.—A policy was issued covering "the steamer, her hull, boilers, machinery, tackle, furniture, apparel, &c., whether stationary or movable, whether the boat should be running or not running, and insured thereon \$5,000 against all such loss or damage not exceeding the sum insured, as should happen to the property by fire other than fire happening by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power." While on a regular trip the boat collided with a schooner, which cut into her hull, in consequence of which she immediately began to fill, and within ten or fifteen minutes the water reached the furnace and the steam thereby generated blew out the fire, which communicated with the wood work of the boat and continued to burn for half or three quarters of an hour, when the boat sunk in twenty fathoms of water. The main deck of the steamer was completely housed in and her freight so stowed that from the effect of the collision alone she would not have sunk below her promenade deck, and might have been towed to a place of safety.

Held, that the fire was "the efficient predominating cause as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water and rendered certain the submergence of the vessel," and that "when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought

* Decision rendered January 22d, 1872. To appear in 54 Ill.

within that peril by a cause not mentioned in the contract."

St. John vs. The American Mutual Ins. Co., 1 Kernan, 519.

Held, also, that "the policy insured against fire caused by the collision," and that the insurer was liable for damage done after the boat had sunk to her promenade deck.

*The Howard F. Ins. Co. vs. The Norwich & N. Y. Trans. Co.**

Rep'd Jour'l p. 425.

U. S. SUPREME COURT.

CONTRACT.

§ 104. *LIFE—When Complete—Burden of Proof—Payment of Premium.*—There was no payment of the premium and no evidence tending "to show any transfer of the legal manual possession of the policy to the assured, or any person for her, so as to constitute a delivery in fact" by the agent. *Held*, that "the policy is *prima facie* incomplete as a contract."

Collins vs. Insurance Co., quoted in *Flanders on Insurance*, 104 note.

"And the burden is upon the plaintiff to show that the real intention and understanding was to pass the legal title and possession without or before payment of the premium and without delivery in fact, and to account for the circumstance, that the policy has not been put into her possession as contracts of the kind usually are when completely executed."

Mackey vs. The Mutual Benefit Life Ins. Co., 103 Mass., 89.

Heiman vs. The Phoenix Mutual Life Ins. Co.†

Rep'd Jour'l p. 415.

MINN. S. C.

§ 105. *LIFE—When Complete—Application—Delivery of Policy—Premium Note.*—Application was made by the assured for a policy on his life for the benefit of his wife, the plaintiff. A policy was transmitted by the company to its agent, whose instructions were that he was not to deliver the policy until he received the premium. The

* Decision Rendered — — 1871.

† Decision rendered January 17th, 1872. To appear in 16 Minn.

agent called at the store of the assured, who was absent from home, and had left his business in charge of his minor son, and showed the son the policy, telling him that the first annual premium was to be paid, part in cash and part by note, and at his request the son signed the note in the name of his father, which the agent took and put with the policy in an envelope and, when the son asked for the policy, told him he would keep it till his father "got home and would wait for the money and keep the policy good until then." The father died without returning home. Plaintiff contended that it was for the jury to determine whether the application had been accepted by the defendant, arguing that if it had been accepted, the contract of insurance existed, although the policy, the formal instrument evidencing the contract, had not been delivered. *Held*, that, "independent of the policy, there is nothing in the case tending to show any acceptance of the application or any agreement to insure. The presumption is, that while there were negotiations there was no contract and no purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of the premiums."

Mackey vs. Mutual Benefit Life Ins. Co., 103 Mass., 92. See also *St. Louis Mutual Life Ins. Co. vs. Kennedy*, 6 Bush, 450.

"The application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer—and not before—the minds of the parties meet and the contract is made."

Taylor vs. Merchants' Fire Ins. Co., 9 How. 390. *Flanders on Ins.* 109.

"This acceptance must be signified by some act; a simple mental acceptance, a mere thought, amounting to nothing," and that "these acts on defendant's part were evidence, not of a contract to insure, but of a willingness to enter into such contract upon performance, *i. e.*, upon payment of the premium by the other party." *Held*, also, that the note "has no tendency to show a delivery of the policy, actual or constructive, or any intent to give

effect to the same as a contract ;” and that there was no evidence tending to show delivery of the policy either actual or constructive.

Heiman vs. The Phoenix Mutual Life Ins. Co.

— § 104.

EVIDENCE.

§ 106. FIRE.—*Estoppel*.—After the loss the insured stated, under oath, that “there was also an insurance on the hardware stock of Clifton K. Howe, by the Phoenix Insurance Company, the premium for \$56.50 paid to said company, and a receipt given by said company which reads as follows: “Received of C. K. Howe \$56.50, full premium, and survey fees on \$2,000 insurance on his stock of hardware, in frame building, etc. * * * Policy to be issued as soon as I receive blank policy, to bear date herewith. Geo. W. Miller, agent Phoenix Ins. Co.” *Held*, that “the statement in the proof of loss did not operate as an estoppel against evidence tending to show that the Phoenix insurance was in fact invalid.”

*Hibbard et al. vs. The Hartford Fire Ins. Co.**

Rep'd Jour'l, p. 178.

Iowa S. C.

§ 107. FIRE—*Ownership of Mortgagor*.—“Defendant offered to show that the property insured was covered by a chattel mortgage at the time the policy was issued. This evidence was offered to establish a forfeiture of a condition of the policy, to the effect that if the insured was ‘*not the sole and unconditional owner*’ of the property, the policy should be void.” The court excluded the evidence, holding it would not establish a breach of the condition. *Held*, that “while under the statute revision, § 2217, the mortgagee holds the legal title to the personal property covered by a mortgage, the mortgagor is nevertheless considered the owner. Such is the current of authorities as to mortgages at common law, which as to the title and ownership of the property conveyed are not different from chattel

* Decision rendered January 27th, 1871. To appear in 29 Iowa.

mortgages under the statute above cited. * * * In our opinion, the evidence was properly excluded.”

White vs. Rittenmeyer, decided at present term of this court; *Rollins vs. Columbian Mut. Fire Ins. Co.*, 5 Foster, N. H. 200; *Pollard vs. Somerset Mut. Fire Ins. Co.*, 42 Mo. 221; *Rice vs. Town*, 1 Gray, 426; *Shepard vs. Union Mut. Fire Ins. Co.*, 38 N. H. 232; *Norcross vs. — Ins. Co.*, Penn. St. 429; *Conover vs. Mut. Ins. Co.*, 3 Denio, 254; *do. 1 Comstock*, 190.

Hibbard et al. vs. The Hartford Fire Ins. Co.

—§ 106.

NOTICE.

§ 108. MARINE—*Newspaper Article*.—The court instructed the jury that if the daily papers containing the news of the disaster to the propeller were received at the office of the company on the morning of the day, “a presumption that the news of the disaster reached the defendant in the forenoon of that day might be indulged, unless such presumption is rebutted by other testimony.” *Held*, that “this instruction is open to the objection of instructing the jury as to the weight of evidence. The having received at the office of the company the papers referred to was but evidence tending to show that the news of the disaster had reached the defendant or its agent Atkins, and the court should not have instructed the jury as to the weight of evidence.”

Merchants Ins. Co., of Chicago, vs. Paige et. al.

—§ 102.

POLICY.

§ 109. LIFE—*Construction of—Payment of Premium*.—The policy provided that “If the said premiums shall not be paid on or before the day mentioned for the payment thereof at the office of the company in the city of New York, unless otherwise expressly agreed upon in writing, or to agents when they produce receipts signed by the president or secretary, then, and in every such case, the company shall not be liable for the payment of the sum insured or any part thereof, &c.” *Held*, that “the true

construction of the clause of the policy is, that the premiums are to be paid on the days fixed by the policy, as amended by the agreement for quarterly payments, in any event; and the assured might pay on those days, either at the office of the company in New York, or to agents; but the payment could only be made to such agents as should have and produce receipts therefor, signed by the president or secretary—the receipts thus signed being evidence of the authority of the agents to receive the premiums,” and that the court erred in instructing the jury that “if a forfeiture of the policy is claimed for the non-payment of premiums, it must be shown that an agent of the company presented a receipt for the premiums to a person liable to pay it, and such person refused or neglected to make payment thereof.”

*Williams vs. The Washington Life Ins. Co.**

Rep'd Jour'l p. 422.

IOWA S. C.

§ 110. LIFE—*Forfeiture of—Non-payment of Premium.* A policy, containing the usual conditions of forfeiture in case of non-payment of premiums, was procured by the mother on her own life for the benefit of her infant daughter, and two quarterly premiums were paid. Afterwards, before the third premium was due, the mother surrendered the policy to the company in consideration of \$40, and no further premiums were paid before her death. *Held*, that as the two premiums due before the death of the mother were not paid, the daughter could not recover under the policy.

Williams vs. The Washington Life Ins. Co.

—§ 109.

§ 111. FIRE—*Avoidance of Subsequent Insurance—Estoppel.*—It was agreed between the plaintiff and the agent of the defendant, on the 18th of December, that a policy should be issued and sent to the plaintiff on that day. On the 21st of the same month the plaintiff agreed with the agent of the Phoenix Insurance Company for a policy covering the same property, and paid him the premium, for

* Decision rendered June 18th, 1871. To appear in 31 Iowa.

which the agent gave him a receipt, specifying that a policy should be issued as soon as a blank should be received. On the 22d of the same month the agent of the defendant delivered to plaintiff the policy sued on, which was dated on the 18th, and received payment of premium. The policy given by the defendant contained a condition in the following words: "If the assured shall have or shall hereafter make any other insurance upon the property hereby insured, without the consent of this company written hereon, in such case this policy shall be void.": The policies commonly issued by the Phoenix Company contained a condition, similar to this in the defendant's policy, against prior or subsequent insurance. *Held*, that "defendant after having collected the premium and delivered the policy bearing date on the 18th cannot be heard to deny that the policy did not operate until its delivery"; that the policy given by the defendant commenced on December 18th and was the prior policy, and that the transaction with the agent of the Phoenix Company raised a contract like that expressed in the policies commonly issued by that company. *Held*, also, that "the Phoenix policy created no insurance if it was avoided by the act of the company, and therefore did not constitute a breach of defendant's policy. The general principal of law upon this point may be stated as follows: In order to avoid a policy on account of subsequent insurance, against an express provision therein, it must appear that subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced."

Jackson vs. Mass. Ins. Co., 23 Pick. 418; *Clark vs. New England Ins. Co.*, 6 Cush. 343; *Gale vs. Belknap Ins. Co.*, 41 N. H. 170; *Stacey vs. Franklin Ins. Co.*, 2 Watts & Sug. 506; *Phelbrook vs. New England Mut. Ins. Co.*, 37 Me. 137; *Scheck vs. Mercer Co. Mut. Ins. Co.*, 4 Zab. 447; *Jackson vs. Farmers' Ins. Co.*, 5 Gray, 52.

Hibbard et al. vs. The Hartford Fire Ins. Co.

—§ 106.

PRACTICE.

§ 112. FIRE—*Exceptions*.—The charge was a very full and elaborate discussion of the law and the facts of the

case, and no particular part of the charge, nor any special proposition of law found in it, was excepted to. *Held*, that "a general exception to the whole of such a charge is insufficient."

*Germania Fire Ins. Co. et al. vs. Boykin.**

Rep'd Jour'l, p. 208.

UNITED STATES S. C.

§ 113. FIRE—*Statute—Prosecution for Violation of Insurance Laws.*—The defendant was prosecuted by information in the St. Louis Court of Criminal Correction, for acting as an insurance agent and receiving a premium for insurance from fire on behalf of a foreign insurance company, the said company not having been authorized by the Superintendent of the Insurance Department to do business within the State, as required by the act referred to in § 43 below. The statutes provided as follows :

§ 43. (Wagner's Statutes, p. 777.) Every violation of this act shall subject the party violating to a penalty of five hundred dollars for each violation, which shall be sued for and recovered in the name of the State of Missouri, by the Attorney General of the State, or the Circuit Attorney of the circuit in which the company or agent or agents so violating shall be situated, and one-half of such penalty, when recovered, shall be paid into the treasury of the State, and the other half to the informer of such violation; and in case of non-payment of such penalty the party so offending shall be liable to imprisonment for a period not exceeding six months, in the discretion of any court having cognizance thereof.

§ 30. (Wagner's Statutes, p. 516.) Whenever a penalty or forfeiture is or may be inflicted by any statute of this State for any offense, the same may be recovered by indictment, (except as in the next section is provided), notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty, or forfeiture; *provided*, that in all cases, the fine, penalty or forfeiture shall go to the State, county, corporation, person or persons to whom the law imposing the same declares it shall accrue.

§ 19. (Act March 5th, 1869.) No indictment shall hereafter be found for any misdemeanor under the laws of this State, committed in the county of St. Louis, the punishment whereof is by fine or imprisonment in the county jail, or both, or by any forfeiture, but the same shall be presented to the Court of Criminal Correction by information. An information in any such case may be lodged by the prosecuting attorney for said Court, or by said assistant prosecuting attorney, or by any other person.

Held that the law authorizes a double remedy, and that

*Decision rendered November 27th, 1871.

the defendant may be so prosecuted by information filed by any person in the St. Louis Court of Criminal Correction.

*State of Missouri vs. Stewart.**

Mo. S.C.

§ 114. FIRE—*Judgment*.—The United States Circuit Court rendered an erroneous judgment upon a correct verdict of the jury. *Held*, that, under the twenty-fourth section of the judiciary act, the Supreme Court must render the judgment which the Circuit Court should have rendered.

Phillips vs. Bury, Skinner, 447; 1 Salkeld, 401; Butcher vs. Porter, 1 Shower, 400; Meller vs. Moore, 1 Bosanquet & Puller; Gildart vs. Gladstone, 12 East. 668.

Germania Fire Ins. Co. et al vs. Boykin.

— § 112

§ 115. FIRE—*Judgment*.—The companies, by their policies, made themselves liable, each separately and severally, for one-fourth of any loss that might occur and no more. By their counsel they consented that the action should be brought jointly instead of severally. Judgment was given against all the companies jointly. *Held*, that the judgment of the court, which is against the defendants jointly and not severally for the full amount of the policy with interest, is erroneous and must be reversed, and that the court ought to have rendered a judgment that plaintiff recover of each of said defendants severally, one-fourth part of the amount insured, with interest, and a joint judgment against all the defendants for costs.

Germania Fire Ins. Co. et al. vs. Boykin.

—§ 112.

§ 116. LIFE—*Jury—Waiver of—Issues of Fact*.—The parties filed a stipulation in writing in the United States Circuit Court, that the issues of fact should be tried by the court without the intervention of a jury. *Held*, that “issues of fact in civil cases pending in the Circuit Courts may be tried and determinad by the Court without a jury, whenever the parties or their attorneys of record file a stip-

* Decision rendered April 3d, 1871 To appear in 48 Mo.

ulation in writing with the clerk of the Court, waiving a jury. Such submission necessarily implies that the facts shall be found by the Court and that when the jury is waived and the issues of fact are submitted to the Court, the finding of the Court may be either general or special, as in cases where an issue of fact is tried by a jury; and that "whether the finding is general or special the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed in this court, and in a case where the finding is special the review may also extend to the determination whether the facts found are sufficient to support the judgment." *Held*, also, that matters of fact found by the Circuit court under such a submission, cannot be re-examined here. "The issues of fact were tried and determined by the circuit court, and the act of Congress provides that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

2 Story on Const., 1,670.

"Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of *a venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.

Parsons vs. Bedford, 2 Pet. 448. 2 Story on Const., Sec. 1,770.

Brooklyn Life Ins. Co. vs. Miller.*

Rep'd Jour'l p. 195.

UNITED STATES S. C.

PREMIUM.

§ 117. *LIFE—Premium Notes.*—The policy was delivered to the assured, the agents of the company receiving his notes in payment of the credit portion of the premium. The cash part of the premium was not paid. *Held*, that

* Decision rendered — 1871.

“where the policy is delivered without requiring payment the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent and the amount is charged to him by the company the transaction is equivalent to payment.

Goit *vs.* Ins. Co., 25 Barb. 189; Sheldon *vs.* Atlantic F. & M. Ins. Co., 26 N. Y. 460; Wood *vs.* Ins. Co., 32 N. Y. 619; Brandon *vs.* Ins. Co., 42 Me. 262; Trustees *vs.* Ins. Co., 18 Barb. 69; same case, 19 N. Y. 305.”

Held, also, that “premium notes were given in this case, and it must be held, under such circumstances, that the insurance company assumes a reciprocal obligation where there is no evidence to impeach the *bona fides* of the transaction.

Whitaker *vs.* Ins. Co., 29 Barb. 319; Post *vs.* Ætna Ins. Co., 43 Barb. 351; Com. M. Ins. Co. *vs.* Union M. Ins. Co., 19 How. 323.”

Brooklyn Life Ins. Co. vs. Miller.

—§ 116.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified Transcripts in our possession.

SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1871.

Appeal from Superior Court of Cook County.

MERCHANTS INS. CO. OF CHICAGO, }
 vs. }
ALBERT PAIGE, *et. al.**

An instruction to the jury, that the receipt of a newspaper containing the news of the loss of a vessel at the office of an insurance company, creates a presumption that the news reached the company, was an instruction as to the weight of evidence and should not have been given.

Notice to one agent of the company does not necessarily impart notice to another agent nor to the company, so far as this defense is concerned.

The agent of the company, through whom the insurance was effected, was the person to whom information of the rumored loss of the vessel should have been given.

HITCHCOCK, DUPEE & EVARTS, for *Appellant*.

SLEEPER & WHITON, for *Appellee*.

SHELDON, J.

This was an action on a marine policy of insurance issued June 7th, 1870, by the appellant, on a quantity of dried fruit, lost or not lost, shipped at Cleveland to the appellees at Chicago, June 3d, 1870, on a propeller of the Union Steamboat Company. The trial in the court below resulted in a verdict and judgment for the appellees.

* Decision rendered January 22d, 1872.

The fruit was laden on the propeller Wabash which was sunk in Lake Huron on the night of the 5th of June by a collision. The insurance was procured by one Stewart from Atkins an agent of the appellants. Previously to procuring the insurance, on the morning of the same day, Stewart had applied to one E. K. Bruce for insurance on the same property, who declined to take it and at the same time told Stewart that the Wabash had sunk, and probably she was the vessel that had the fruit on board. The ground of defense was, that Stewart did not communicate this information to Atkins.

It was agreed on the trial that Atkins, who was absent, would, if present, testify that at the time Stewart applied to him for the policy he had no information that the Wabash had sunk and that Stewart did not communicate any information to him on that subject. It seems to be admitted that if Atkins had possessed this information, Stewart was not required to communicate it to him.

Upon the trial the court gave to the jury the following instruction on behalf of the plaintiff: "If the daily papers of this city, containing the news of the disaster to the Wabash were received at the office of the company on the morning of the 7th of June, 1870, a presumption that the news of the disaster reached the defendant in the forenoon of that day might be indulged, unless such presumption is rebutted by other testimony." We think this instruction is open to the objection of instructing the jury as to the weight of evidence.

The having received at the office of the company the papers referred to, was but evidence, tending to show that the news of the disaster had reached the defendant or its agent, Atkins, and the court should not have instructed the jury as to the weight of evidence. The jury should have been left free to weigh for themselves the evidence, and determine upon its effect uninfluenced by the opinion of the court.

The evidence shows that the news of the sinking of the Wabash had been actually received at the office of the company on the morning in question, and it may be said that the instruction could have done no harm there being positive proof that such information was actually received at the company's office. But information received at the office of the defendant was not necessarily received by the defendant so as to obviate the defense here set up. The defendant is an incorporeal entity, which transacts its business by the instrumentality of agents and notice to one does not necessarily

import notice to another of its agents, or to the defendant so far as this defense is concerned.

Atkins being the particular agent of the company, through whom the insurance was effected, he was the person who should have had the information in question. His duties were not within the office, but his business was upon the Board of Trade, to look up marine risks, where he seems to have been in attendance through the business hours of the day named. And information at the office of the company was by no means the same as information to him, or in the language of the instruction, to the "defendant." The instruction was faulty, too, in its being calculated to mislead the jury as to the person who should have had the information, as well as in pronouncing as to the weight of the evidence. For error in giving this instruction the judgment must be reversed and the cause remanded.

Judgment reversed.

SUPREME COURT OF MINNESOTA,

JULY TERM, 1871.

THERESIA HEIMAN, *App't.*,
vs.

THE PHOENIX MUTUAL LIFE INS. CO., *Resp't.** }

The presumption is that after the application was made and before the policy was delivered, while there were negotiations, there was no contract and no purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of the premium.

The application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer,—and not before—the minds of the parties meet and the contract is made.

This acceptance must be signified by some act; a simple mental acceptance—a mere thought—amounting to nothing.

The making and forwarding of a policy by the company to its agent, whose duty it was to receive the premium and deliver the policy to the insured, and the presentation of the policy to the agent of the party making the application was evidence, not of a contract to insure, but of a willingness to enter into such contract upon payment of the premium.

Where there was no payment of the premium and no evidence of a transfer of the legal manual possession of the policy to the assured so as to constitute a delivery, in fact, the policy is *prima facie* incomplete as a contract, and the burden is upon him to show that the real intention and understanding was to pass the legal title and possession without or before payment of the premium.

* Decision rendered January 17th, 1872.

Held, that the receiving of a note from the person making the application, by an agent of the company, for a part of the first premium has no tendency to show a delivery of the policy, actual or constructive, or any intent to give effect to the same as a contract.

ALLIS, GILFILLAN & WILLIAMS, *for Appellant*.

BIGELOW, FLANDRAU & CLARK, *for Respondent*.

BERRY, J.

The defendant is a Life Insurance Company, duly incorporated under the laws of Connecticut, and authorized to transact business in the State of Minnesota. That on July 15th, 1869, an application was made to defendant through its duly authorized agent at St. Paul by Hirsch Heiman for an insurance upon his life, for benefit of plaintiff, his wife; that defendant upon such application made out a policy and transmitted same to its agent in Minnesota, by whom it was received on or about August 3d, 1869. Plaintiff introduced testimony tending to show that about August 10th, Hirsch Heiman went out of Minnesota, of which he was a resident, upon a temporary absence, leaving his minor son Isidor Heiman in charge of the business which he followed; that on or about August 25th, and about fifteen days after said Hirsch had left this State, as aforesaid, one Thompson, who had received the policy from Van Dusen, defendant's general agent in Minnesota, came to the store in which Isidor was conducting his father's said business, and informed said Isidor that he had the policy, at the same time showing it to said Isidor, who read it, and informing him that the first annual premium, about \$100, was to be paid in cash, and a note to be received for about the same sum; that Isidor told Thompson that he could not pay him any money, but would sign the note; that at said Thompson's request Isidor signed the note for and in the name of his father; that Thompson took the note and put it with the policy in an envelope; that Isidor then asked said Thompson for the policy, but that Thompson said he would keep it till said Hirsch Heiman got home and would wait for the money and keep the policy good until then. That said Thompson did not deliver the policy to said Isidor; that Isidor informed said Thompson that he expected his father home in a few days; that the note has never been returned.

The note was of the tenor following—blanks filled up.

HARTFORD. ———.

Twelve months after date, for value received I promise to pay the Phoenix Mutual Life Insurance Company or order ——— dollars, with interest payable annually in advance at 6 per cent., it being for part premium due and payable on policy No. ——— of said Company, on the life of ———.

dated ———, which policy and all payments or profits which may become due thereon are hereby pledged and hypothecated to said Company, for the payment of the note.

Said Isidor, examined for plaintiff, testified on cross-examination, as follows: "Mr. Thompson asked me for the money; he said there was so much to be paid; he asked if I could pay it. I said I was pretty short, but that my father would be home soon; he did not urge me to pay it; * * * did not tell me that it was necessary to pay the premium." Josiah Thompson, examined for plaintiff, testified that he received the policy from Van Dusen, (the defendant's general agent in Minnesota), "to deliver and collect the premium on it the same as on other policies; that he had no special instructions in this case, that his instructions in every case were that the policy was not to be delivered till he received the premium." Hirsch Heiman never returned. He died on September 9, 1869, and proper proofs of his death were duly served upon defendants. After some other evidence, not important upon this appeal, the plaintiff rested. Defendant moved to dismiss upon the ground that "plaintiff had failed to establish a cause of action." Motion granted. Plaintiff moved for a new trial, and from the order denying the latter she appeals.

Plaintiff argues that the dismissal was erroneous, because,

1st. Even admitting the policy was never delivered, there was evidence tending to prove a contract of insurance, upon which evidence the jury should have been allowed to pass. This position has reference to the evidence that an application for insurance had been duly made, and a policy based thereupon had been signed and sealed by defendant, and forwarded to an agent whose duty it was to receive the premium and deliver the policy to the insured.

Plaintiff contends that upon this evidence it was for the jury to determine whether the application had been accepted by the defendant, arguing that if it had been accepted, the contract of insurance existed, although the policy, the formal instrument evidencing the contract, had not been delivered.

But, as independent of the policy, there is nothing in the case tending to show any acceptance of the application, or any agreement to insure. The presumption is that while there were negotiations, there was no contract and no purpose to contract otherwise than by a policy made and delivered upon simultaneous payment of the premium.—*Mackey vs. Mut. Ben. Ins. Co.*, 103 Mass., 92; see also *St Louis Mut. Ins. Co. vs. Kennedy*, 6 Bush., 450.

The application for insurance is a mere proposal on the part of the

applicant; when the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet, and the contract is made.—*Taylor vs. Merch. F. I. Co.*, 9 How., 390; *Flanders on Ins.*, 109. This acceptance must be signified by some act—a simple mental acceptance, a mere thought, amounting to nothing.

Now the acts of defendant relied on by plaintiff as showing an acceptance of her proposal, are the making of the policy and the forwarding of the same to an agent, whose duty it was to receive the premium and deliver the policy to the insured, to which may in this case be added the presentation of the policy to plaintiff's alleged agent. But while these acts were indicative of an acceptance of plaintiff's application, they were, under the presumption above mentioned, evidence of an acceptance only as the basis of a contract to be entered into by a policy which was to be made and delivered, so as to become operative as a contract only upon the simultaneous payment of the premium. In other words, these acts on defendant's part were evidence not of a contract to insure, but of a willingness to enter into such contract upon performance—(*i. e.*, upon payment of the premium), by the other party. It may be further added in reply to a portion of the counsel's reasoning, that the application being a mere proposal "cannot be converted into a contract by delay on the part of the company," or its agent in rejecting or accepting it.—*Flanders on Ins.*, 109; *Ins. Co. vs. Johnson*, 11 Harris, 72. So far then as the first position taken by plaintiff's counsel is concerned, the dismissal of the action was not erroneous.

In the second place, the plaintiff insists that the dismissal was wrong because there was evidence tending to prove a delivery of the policy. It is not claimed that the exhibition of the policy to Isidor Heiman, or his temporary possession of the same while reading it, amounted to a delivery. It was evidently handed him for inspection simply, and not with design to vest its legal possession in him or in any person through him.—*Mackey vs. Mut. Ben. Ins. Co.*, *supra*, 89. A delivery "may either be actual—that is, by doing something and saying nothing; or verbal—that is, by saying something and doing nothing, or it may be by both; but it must be by something answering to one or the other, or both these, and with intent thereby to give effect to the deed."—*Wash. Real Prop.*, 578, and cases cited; *Stevens vs. Hatch*, 6 Minn., 74; *Mills vs. Green*, 20, Pick. 35.

In the case at bar no evidence tends to show any transfer of the legal manual possession of the policy to the assured, or to any person for her, so as to constitute a delivery in fact. Then, the

policy is *prima facie* incomplete as a contract—*Collins vs. Ins. Co.*, quoted in *Flanders on Ins.*, 104—note, and the burden is upon the plaintiff to show that the real intention and understanding was to pass the legal title and possession without or before the payment of the premium, *Mackey vs. Mut. Ben. Ins. Co.*, *supra*, and without delivery in fact, and to account for the circumstance that the policy has not been put into her possession, as contracts of the kind usually are when completely executed; or, in other words, to show that though retained by Thompson the policy was constructively delivered, or, in the language of the plaintiff's counsel, that Thompson's possession was the possession of the assured. To show this, the plaintiff must prove that there was something said or done, or both, with intent thereby to give effect to the policy. Plaintiff relies upon the testimony of Isidor Heiman, as follows: "I said I could not give him (Thompson) any money, as we were short, but I would sign the note, and I signed it for my father at Mr. Thompson's request. He took the note and put it with the policy in an envelope. I then asked him for the policy; but he said he would keep it till my father got home; he said he would wait for the money until my father got home, and would keep the policy good till then." In considering this testimony, it is material to bear in mind that there was no manual delivery of the policy. This makes the refusal to deliver, upon express request, quite significant. The refusal goes to show not only that Thompson did not intend to give effect to the policy, but that he meant to have his intention clearly understood. But, viewed in connection with Thompson's positive refusal to deliver, we think that a more particular analysis of the language above quoted places the fact that there was no intent to give effect to the policy beyond doubt. "He said he would keep it (the policy) till my father got home." Certainly there is nothing in these words indicating the intent referred to. "He said he would wait for the money until my father got home." This is not saying that he would give credit for the cash part of the premium, and meantime hold the policy as a deposit and as the property of the assured; but the policy is retained for the payment of the premium. See *Hoyt vs. Mut. Ben. Ins. Co.*, 98 Mass., 544. Thompson saying in effect, "I will not deliver the policy so as to make it operative as a contract, because the money is not paid, but I will retain the policy, and wait until Hirsch Heiman returns, to give him an opportunity to pay the money and receive a delivery of the policy." The case is not analogous to those in which policies have been in fact deliv-

ered, though in violation of their own terms or of authority before premium paid, prepayment having been waived, or a credit given for the premium. Policies issued under such circumstances have been upheld because actually delivered, and with intent that they shall take effect. *Sheldon vs. Conn. Mut. Life Ins. Co.*, 25, Conn., 207; *Goit vs. Mut. Ben. Ins. Co.*, 25 Barb., 190; *Sheldon vs. Aetna Ins. Co.*, 26 N. Y., 460. There is no credit given in the case at bar, not only because none is expressed, but because there being no delivery of the policy, but a refusal to deliver it, there was no consideration moving from the defendant for any obligation on the part of the assured for which to give credit, and for the further reason that there was no consideration moving from the assured for any agreement on the part of the defendant to give credit. *Hoyt vs. Mut. Ben. Life Ins. Co.*, *supra*. "And would keep the policy good until then." Now keeping in mind that when this was said there had been no actual delivery of the policy, but a refusal to deliver it, and that there had been no agreement to hold it as the property of the assured, it seems to us that these words can only mean that he would keep the policy as good as it then was. He does not agree to make it good, to make it operative as a contract, to give effect to it as a policy, but simply to keep it good. As is suggested by counsel for defendant, we think this means nothing more than that he would retain the policy, would not return it to the home office as is usually required, but would keep it good, so that when *Hirsch Heiman* returned he might have the same opportunity to pay the premium, and take a delivery of the policy, as he would have had if then present. It is to be observed, also, that *Thompson* said he would keep the policy, wait for the money, and keep the policy good, all, until *Hirsch Heiman got home*. All of these alleged promises are based upon the idea that *Heiman* would get home. The words italicised are then, as it seems to us, in the nature of a condition upon the fulfillment of which whatever binding force these promises may possess depends. It is as if *Thompson* had promised to do these things until *Heiman* came home; if, or provided, he came home. When the fulfillment became impossible, as it did by *Heiman's* death, the promises, if ever binding, bound no longer. As to the note, when it is considered with reference to the circumstances under which the testimony shows it to have been taken, it has no tendency to show a delivery of the policy, actual or constructive, or any intent to give effect to the same as a contract. Admitting that *Isidor Heiman* had authority to make the note, it could, at most, only go in part

payment of the premium ; and unless it was so agreed (and there is no evidence of such agreement), the assured would not, upon simply executing and delivering the note, be entitled to a manual delivery of the policy, or to claim that Thompson's possession of it should be held as her possession. For, notwithstanding the execution of the note, the condition upon which defendant's liability upon the policy is to attach is in part unperformed. *Flanders on Ins.*, 110 ; *Sanford vs. The Mut. Fire Ins. Co.*, 11 Paige, 547. Nor is the retention of the note by the defendant, or its agent, important. Admitting that it is negotiable paper, and that it does not carry notice of its infirmity upon its face, there is nothing in this case to show that defendant has negotiated it or claims to hold it adversely, or is not ready to deliver it up on proper demand. Certainly it is not defendant's duty to seek out the proper person to whom to tender it or give it up. *Parker vs. Parker*, 1 Gray 409 ; *St. Louis Mut. Life Ins. Co. vs. Kennedy*, *supra*.

Passing from these details, when we consider, generally, that all that was said and done at the interview between Thompson and Isidor Heiman, was said and done in immediate connection with Thompson's positive refusal to deliver the policy, we think there is no reasonable construction of his language or acts which will justify the inference that though he refused to give effect to the policy by manual delivery, he intended, or was understood to intend, that he would hold the policy as the property of the assured, thereby making a constructive delivery of it, so that his possession would be the assured's possession, and the policy be as good to her, to all intents and purposes, as if he had made manual delivery thereof. And this inference is still more unwarrantable when we call to mind that upon the testimony introduced by plaintiff it appears that Thompson was instructed not to deliver policies until the premium was paid, and that in the absence of clear affirmative evidence to the contrary, he is not to be presumed to have disobeyed his instructions and violated his obligation to his principal.

As, in our opinion, then, the plaintiff failed to adduce evidence which by any fair construction tends to establish a contract of insurance or a delivery of the policy, actual or constructive, the order dismissing the action was right, and the order denying a new trial must be affirmed.

Ordered accordingly.

SUPREME COURT OF IOWA,

JUNE TERM, 1871,

*Appeal from Dubuque Circuit Court.*ISABELLA WILLIAMS, *by her next friend, Appellee,* }

vs. }

THE WASHINGTON LIFE INS. CO., *App't.**

Where a policy provided that payment of premiums should be made on or before a certain day at the office of the company, "or to agents when they produce receipts signed by the president or secretary," it is not necessary to show that an agent of the company presented a receipt for the premiums and that payment was neglected or refused. The true consideration of the clause is that the premiums were to be paid on the day fixed by the policy, in any event, and that they might be paid at the office of the company or to such agents as should have and produce receipts signed by the president or secretary, as evidence of their authority to receive the premiums.

A policy was procured by a mother upon her own life for the benefit of her infant daughter and two quarterly premiums paid. The mother then surrendered the policy to the company and no further premiums were paid before her death. *Held*, that as the two premiums due before the death of the mother were not paid, the daughter could not recover under the policy, and that it was not necessary to inquire whether the mother could or could not, for a consideration, surrender or cancel the policy.

Action upon a life insurance policy, made by the defendant March 1st, 1869, insuring the life of Mary F. Williams, the mother of plaintiff. The petition alleged the execution of the policy upon an agreed consideration, the death of the insured, notice and proof thereof, and the failure of defendant to pay. The answer admits the execution of the policy, the death and notice thereof, but alleged the non-payment of the premiums as they became due, specifying them, and the forfeiture of the policy thereby, and also that subsequent to the execution and delivery of the policy, in consideration of the re-payment of all premiums and expenses by the defendant to the insured, the policy was surrendered to defendant and cancelled. The cause was tried to a jury. The defendant, at plaintiffs request, produced the policy: the only parts thereof upon which any question arises, are as follows: "This policy of insurance witnesseth, that the Washington Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of fifty one dollars to them duly paid by the assured under this policy, to wit, Isabella Williams,

*Decision rendered June 16th, 1871.

daughter of Mary F. Williams, and of the annual premium of fifty one dollars to be paid on or before the first day of March, in every year during the continuance of this policy, do insure the life of the said Mary F. Williams, of Dubuque, in the County of Dubuque, State of Iowa, in the amount of twenty-five hundred dollars (with participation in profits) for the term of her natural life, * * * if the said premium shall not be paid on or before the days above mentioned for the payment thereof, at the office of the Company in the City of New York, unless otherwise expressly agreed in writing, or to agents, when they produce receipts signed by the President or Secretary, then, and in every such case, the Company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall be null and void and shall cease and determine, except in the case of the due surrender of this policy as herein provided." The application stated the "name of the person for whose benefit the insurance is applied for, Isabella Williams; residence, Dubuque; relationship, daughter;" and was signed, "Isabella Williams by Florence Williams."

The evidence showed that a few days after the application was forwarded to the company, a request for a change from annual to quarterly payments was also forwarded and the change was granted by the company, and the first payment of premium on the delivery of the policy was a quarterly payment of \$16.66. The weight of the evidence showed that Mary F. Williams, the and mother, whose life was insured, had some means of her own and that she procured the policy with a view to a provision for her daughter, then quite young. The quarterly payment of \$16.67 due on first of June, 1869, was also paid. On the 8th day of July, 1869, Mary F. Williams, in consideration of forty dollars paid to her by the company, surrendered the policy to the company, and acknowledged the same to be in full for all claims under it. No further premiums were paid, or other act done under the policy. Mary F. Williams died December 3d, 1869. Under the instructions of the Court, the jury found for the plaintiff. Judgment accordingly. The defendant appeals.

SHIRAS, VAN DUZEE & HENDERSON, *for Appellant.*
ADAMS & ROBINSON, *for Appellee.*

COLE, J.

The court instructed the jury that "by the terms of the policy a mere omission to pay the premiums when due, would not alone work a forfeiture; if a forfeiture of the policy is claimed, for the

non-payment of premiums, it must be shown that an agent of the company presented a receipt for the premiums to a person liable to pay it, and such person refused or neglected to make the payment thereof." This is assigned as error. The language of the policy is, "If the said premiums shall not be paid on or before the day above mentioned for the payment thereof, at the office of the company, in the city of New York, (unless otherwise expressly agreed in writing), or to agents when they produce receipts signed by the president or secretary, then, and in every such case, the company shall not be liable for the payment of the sum insured, or any part thereof, etc." In our view, the true construction of this clause of the policy is, that the premiums are to be paid on the days fixed by the policy (as amended by the agreement for quarterly payments) in any event; and the assured might pay *on those days*, either at the office of the company in New York, or to agents; but the payment could only be made to such agents as should have and produce receipts therefor, signed by the president or secretary—the receipts thus signed being evidence of the authority of the agents to receive the premiums. This construction is in accord with the plain and ordinary meaning of the language used, with the uniform rule of insurance, requiring prompt and advance payments, and with even a technical construction of the language. The policy fixes *the time* for payment, and then says it may be made to the company or to agents when they produce receipts, etc.

It being conceded that the premiums due on Sept. 1st and Dec. 1st, 1869, were, without excuse, not paid nor offered to be paid, it is fatal to plaintiff's case. We need not, therefore, inquire whether the mother could or could not, for a consideration, surrender or cancel the policy. It having been done and no objection made to it, no premiums paid, or act done or claim made, under the policy, until after the death of the assured, the plaintiff cannot recover.

It was error to give the instruction.

Reversed.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1870.

In Error to the Circuit Court of the United States for the District of Connecticut.

THE HOWARD FIRE INS. CO., *Pl'ffs in Error,*

vs.

THE NORWICH AND N. Y. TRANSPORTATION CO. }

The boat was insured against fire. The water let into the boat by a collision, generated steam in the furnace, which blew out the fire setting fire to the boat, causing her to sink until totally submerged, when, but for the fire, she would only have sunk to the promenade deck. *Held*, that the fire was the efficient predominating cause, and the one nearest the catastrophe which directly contributed to all the damage done after she had sunk to her promenade deck.

The fire in this case was caused by the collision, but the policy insured against fire caused by collision.

When an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be released from responsibility by showing that the property was brought within that peril by a cause not mentioned in the contract.

The insurer was liable for damage done after the boat had sunk to her promenade deck.

Mr. Justice STRONG, delivered the opinion of the Court.

Mr. Phillips in his *Treatise on the Law of Insurance*, lays down two rules respecting the concurrence of different causes of loss, which the plaintiffs in error contend should be applied to this case, and which, if applied, they insist must lead to a reversal of the judgment in the court below. The first of these is: "In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A, and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion." The second is, "Where different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss. Phillips on Insurance, vol. 1, secs. 1136, 1137. These propositions may be accepted as

correct statements of the law, and the question before us is, whether the circuit court, in giving judgment for the assured, failed to apply them rightly to the facts of the case.

The plaintiffs in error insured for the defendants, the steamer *Norwich*, against fire, and the policy was in force when the loss occurred. It covered the steamer, her hull, boilers, machinery, tackle, furniture, apparel, etc. whether stationary or movable, whether the boat should be running or not running, and insured thereon five thousand dollars against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire, other than fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. Thus loss from fire happening in consequence of every other cause than those excepted was covered by the policy. The insurers took the risk of fires caused by lightning, explosions, and collisions. Such was the contract.

The circumstances attending the loss, as appears from the special findings of the court by which the case was tried, without the intervention of a jury, were substantially these: While on one of her regular trips from *Norwich* to New York, on Long Island Sound, the steamer collided with a schooner, the latter striking her on her port side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of the furnace, and the steam thereby generated blew out the fire, which communicated with the wood work of the boat. Her upper works and her combustible freight were soon enveloped in flames, and they continued to burn half or three-quarters of an hour, when she gradually sunk in twenty fathoms of water, heeling over. The steamer was so constructed that her main deck was completely housed in from stem to stern, up to her promenade, or hurricane deck above. Her freight was stowed on the main deck, and her cabin and state-rooms were on the hurricane deck. From the effects of the collision alone she would not have sunk below her promenade deck, but would have remained there suspended in the water, and would have been towed to a place of safety, when she, her engines, tackle, and furniture could have been repaired and restored to their condition prior to the collision for the sum of fifteen thousand dollars, the expense of towage included. The sinking of the steamer below her promenade deck was the result of the action of the fire in burning off her light upper works and housing, thus

liberating her freight, allowing much of it to drift away, whereby her floating capacity was greatly reduced, so that she sunk to the bottom, and all the damage which she suffered beyond the fifteen thousand dollars above named as chargeable to the collision, (amounting to seventy-three thousand dollars,) including the cost of raising the boat, was the natural and necessary result of the fire and of the fire *only*. All this is found as facts by the circuit court.

It is now urged on behalf of the plaintiffs in error that these findings establish the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of fifteen thousand dollars chargeable to the collision, was the result of two concurrent causes, one the fire, and the other the water in the steamer's hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating, and, therefore, the proximate cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion. But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the collision, nor the presence of water in the steamer's hold was the predominating efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point. The effects of the fire was necessary to give it additional efficiency. The fire was, therefore, the efficient predominating cause, as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water, and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself. The effects of the prior disaster would then have been complete. The steamer would have been full of water, sunk to her promenade deck, and, remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the

next day, destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed, the water would have been as truly a concurrent and efficient cause of the steamer's sinking, as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case, in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss? Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately followed the filling of the steamer with water, or commenced while she was filling, but the effects of the fire are conclusively distinguished from the breach in the steamer's hull, and the filling of her hold with water. The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond sinking of the steamer to its upper deck, when she would have been saved from further injury.

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim, "*proxima causa, non remota spectatur*," but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect, for example, to cause a loss, the law will never regard an antecedent cause of that cause, or the "*causa causans*."—*Gen. Mutual Ins. Co. vs. Sherwood*, 14 How., 366. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. Such is, in effect, Mr. Phillips' rule. And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire, and that caused by the filling of the steamer are clearly distinguished.

It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire, but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.—*St. John vs. the American Mutual Ins. Co.*, 1 Kernan, 519. That case is instructive, and is, in one particular at least, responsive to the argument of the plaintiffs in error. It exhibits the difference, in effect, between an express exception from a risk undertaken, and silence in regard to a peril not insured against. The policy, as here, was against fire, but it contained a provision that the company would not be liable “for any loss occasioned by the explosion of a steam boiler.” While it was in force there was an explosion of a steam boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. The proviso, or exception, was construed as extending to fire caused by such explosions, for, as the parties were contracting about the peril of fire alone, an *express* exception of all loss from explosions must have been meant to cover fire when a consequence of explosions, otherwise the exception would have been unmeaning. But the court said, if nothing had been said in the policy respecting a steam boiler, the loss, having been occasioned by fire, as its proximate cause, would have rested on the insurer, though it had been shown, as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the court would not have enquired how the fire happened, whether by an explosion or not. In the case before us there is no exception of collisions, or fires caused by collisions. It must therefore be understood that the insurers took the risk of all fires not expressly excepted.

It has been argued that because the policy was against fire only, the assured are to be considered their own insurers against perils of the sea, including collisions, and as insurers against marine risks are liable for collisions, with all their consequences, including fires, the assured in this case must be held to have undertaken that risk. This would be so if they had taken out no policy against fire. But that works a material difference. Suppose these underwriters had insured the steamer against collisions and fire, and had then re-insured in another company against fire alone, as they might have done, would it have been a sufficient answer to a suit brought by them against their insurers, that the fire which caused the steamer to sink

When the assured was asked whether he had had any of several specified diseases, and further whether he had had any sickness within ten years, and it afterwards appeared that he had once had chronic pharyngitis, a disease not specified, it was for the jury to decide whether chronic pharyngitis was a sickness in the contemplation of the parties putting and answering the questions.

It was a question for the jury to decide whether a chaplain in the army is in the military service, and whether the assured, if in the military service, was ever actually employed in such service.

Whether certain facts connected with an application by the assured to another company for insurance, amounted to his application being declined or not is a question for the jury to pass upon, and unless his application was in reality declined, he was under no obligation to disclose such facts in answer to a question whether any company had declined to insure him.

Evidence to show that a person—a preacher—insured in 1867, was so fatigued by the morning services in 1860 or 1861, that he was compelled to omit services in the afternoon is irrelevant.

Where the plaintiff was a citizen of Virginia, at the time of the institution of the suit, the provisions of the act of Congress authorizing removals from the state to the federal courts do not apply.

GRASON, J.

The record in this cause contains two exceptions, the first taken to the ruling of the court below in excluding from the consideration by the jury the evidence therein set out; and the second to the rejection of ten of the eleven prayers offered by the appellant, the first prayer having been conceded. The rejected prayers all relate to certain answers made by Henry A. Wise, Jr., to questions five, eleven and fifteen put to him, before the policy was issued, by the agent of the appellant. The appellee, by her declaration in writing, dated the 17th day of May, in the year 1867, (the same day the policy bears date), and filed with the application, declared that the age of said Henry A. Wise, Jr., at his next birthday thereafter, would be thirty three years; that he did not, to the best of her knowledge and belief, practice any bad or vicious habit that tended to shorten life; and that she had an interest in his life to the full amount of twenty thousand dollars; and she thereby agreed that the answers of said Henry A. Wise, Jr., and those of his friend and physician, should be the basis of the contract between herself and the company; and that, if any untrue or fraudulent allegation should be contained in these answers or in said declaration, allowances which should be paid to the company on account of the insurance made in consequence thereof, should be forfeited for the benefit of the company. The policy contains a stipulation that it shall be void if "the declaration, made by the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue."

The fifth, eleventh and fifteenth questions, to which the prayers refer, and the answers thereto, are as follows: 5th. "Has the party been, or is he now employed in any military or naval service?" The answer was "No." 11. "Has the party had any sickness within the

last ten years ; if so, what?" The answer was "Pneumonia in 1862." 15. "Has any company declined to insure the party ; if so, what company, when and for what reasons?" The answer was "No."

The contract between the parties having been entered into upon the basis of the truth of these answers, it becomes necessary to ascertain whether they constitute warranties, (which cast upon the assured the onus of proving the literal truth of them,) or whether they are representations merely ; and if representations, whether their materiality, as well as their truth, is to be passed upon by the jury. We have carefully examined and considered the authorities referred to in the argument, and are of opinion that the true rule of construction of contracts like this, is that adopted and acted upon in the cases of *Anderson vs. Fitzgerald*, 4 H. of Lords, cases 503, 514 ; and *Campbell vs. New England Ins. Co.*, 98th Mass. 381. Both of those cases presented questions almost identical with those raised in this case, and in each of them it was held that the answers were not warranties, but representations made material by the agreement of the parties and therefore that their truth alone was open to the consideration of the jury. In those cases it was also held that it was not incumbent upon the insurer to show that the answers were morally false ; but that, if they were shown to be simply untrue, it would be sufficient to defeat the plaintiff's action. Being satisfied that those cases announce the true rule of construction of such contracts as the one before us, we will now proceed to consider the prayers.

The second, third, ninth and tenth prayers refer to the eleventh question and answer. Upon the theory of these prayers, notwithstanding the jury might find that Mr. Wise's answer that he had pneumonia in 1862 was true, yet their verdict must have been for the appellant, if they further found that he had "Chronic Pharyngitis" within the ten preceding years, and that he had not communicated that fact, and that he had been treated therefor by a physician, however innocent he may have been in making said answer. By the tenth question, Mr. Wise's attention had been directed to certain diseases, specifically enumerated therein, and had been asked if he had any of those diseases ; and upon his replying in the negative, he was asked by the eleventh question if he had had any sickness within ten years. It is not alleged that the answer to this question, as far as it went, was untrue, but it is contented that it ought to have gone further, and disclosed the fact that he had had Chronic Pharyngitis in 1860, or 1861. There is evidence in the record to show that Pharyngitis is an inflammation of the throat and, when slight, not to be called a sickness, and not likely to shorten life. If the policy in this case is to

be avoided by the fact of Mr. Wise having had this affliction in 1860, or 1861, and by his not having disclosed that fact in his answer, then, if he had suffered from any slight indisposition or sickness within the same period and had failed to communicate that fact in answer to the eleventh question, the policy of insurance would have been made void. His attention having been directed by the tenth question to certain diseases particularly named therein, Mr. Wise may have very naturally supposed that the eleventh question had reference to diseases or sicknesses of the same class and like importance. It will be recollected that Pharyngitis is not named in either the tenth or eleventh question, and that there was proof to show that it is an affection slight in its character and effects; and if, as matter of law, a policy is to be avoided if a party insured is shown to have had it some six or seven years before insurance, and that he failed to make it known in answering a question like the eleventh, then policies on lives, where the truth of answers to questions is made the basis of the contracts, would be mere devices by which insurance companies could obtain money by way of premiums without becoming liable upon the policies issued to the insured. The four prayers, now under consideration were therefore properly rejected, because, they did not leave it to the jury to find from all the evidence before them upon this matter, whether "Chronic Pharyngitis" was a "sickness" in contemplation of the parties in putting and answering the eleventh question in addition to the other facts which these prayers required the jury to find.

The eleventh prayer denied the appellee's right to recover if the jury should find that Mr. Wise was a chaplain in the Confederate army in the year 1862. The only evidence as to this point, was a statement of Mr. Haxall, who, without being inquired of about the matter, so testified at the trial below: The fifth question put to Mr. Wise and answered by him in the negative, was, "Has the party been, or is he now *employed* in any military or naval service?" There is no evidence to show whether a chaplain in the army is, or is not in fact in the *Military Service*, and none to show that Mr. Wise was ever actually *employed* in said service, even if a chaplain can be said to be in the military service. He may have held the position of chaplain without having been ever actually employed. The onus of proving such employment was upon the appellant, and it was a question properly and exclusively for the jury to pass upon, and as the eleventh prayer did not submit to the finding of the jury, either the question, whether a chaplain in the army is in the military service, or the question whether Mr. Wise, if in the mil-

itary service, was ever actually *employed* in such service, it was properly rejected.

The fourth, fifth, seventh and eight prayers, refer to the fifteenth question and answer. In answer to the question whether any company had declined to insure Mr. Wise's life, he said "No." He had, in fact, made application to Mr. Bresee, General Agent, at Baltimore, of the Mutual Life Insurance Company, of New York, for insurance in that company. Mr. Bresee sent on to the President of his company in the same letter the applications of Macmurdo Staley and Wise, and several days afterwards received reply from the Vice-president of the company in the following words, viz :

"I have received your letter dated 1st May. I enclose policies. No. 62.-413 Macmurdo. \$36.13; Staley, declined; Wise, returned. See mem."

The proof shows that Macmurdo's policy was granted; that "declined" opposite Staley's name indicated that his application had been finally acted upon and rejected; and that the memorandum referred to in the letter as made upon Mr. Wise's application was the word "returned" or "withdrawn," which indicated that his application might be reconsidered. Dr. Donaldson, the examining physician of the New York Company, had reported that Mr. Wise's weight did not correspond with his height by forty pounds. Mr. Bresee proved that Mr. Wise did not know that his application had been sent on to New York; that he had no means of knowing; that after it was returned from New York he sent a message to Mr. Wise that his company had some rules about a man's weight corresponding with his height, and that he thought that there might be some difficulty or doubt about his application passing, and advising him to withdraw it; and that Mr. Wise sent a message in reply, that he would not take a policy if the company would give it to him; that he would not insure in a company having such nonsensical rules. Mr. Winston, the President of the New York company, was twice asked upon his examination, whether Mr. Wise's application had been declined by his company, without eliciting a reply in the affirmative. The fourth and seventh prayers asked instructions, in substance, that if Mr. Wise did not make known, in answer to the fifteenth question, the facts connected with his application to the New York company, the plaintiff was not entitled to recover. The court below was right in rejecting those two prayers, because they did not submit to the jury to find upon all the evidence in relation thereto, whether any other company had *declined* to insure Mr. Wise's life. That was a question exclusively within the province of the jury to pass upon. For the same reason, the fifth prayer, which asked the court to say, as matter

of law, that the above facts amounted to a declining of Mr. Wise's application, was also properly rejected. The sixth and eighth prayers do not deny the appellee's right to recover upon the ground of any want of truth in Mr. Wise's answer to the fifteenth question, but upon the ground that it was the duty of Mr. Wise to have disclosed to the appellant, all the facts connected with his application to the New York Company, and its return and fate. In other words, the sixth and eighth prayers are based, in effect, upon the theory of a fraudulent concealment by Mr. Wise of facts, which good faith and fair dealing required him to disclose. Mr. Bresee testified that Mr. Wise did not know that his application had been sent on to New York, that he had no means of knowing; that he had never seen Mr. Wise after the application had been made out, and that he thought he had returned Mr. Wise's application to him, as he had not been able to find it at his office. If Mr. Wise did not know that his application had been presented to, and considered by the New York Company, but believed that the suggestion for its withdrawal, came from Mr. Bresee, alone, for the reason that Mr. Wise's weight did not correspond with his height, how can it be said that there was any concealment of facts, or want of good faith in not disclosing them. The prayers should have left it to the jury to find whether or not, upon all the evidence before them, Mr. Wise knew all the facts connected with said application, its return and fate, and knowing them concealed them. Not having submitted that question to the jury, the sixth and eighth prayers were properly rejected.

We think that the evidence set out in the first bill of exceptions was clearly inadmissible. Whether Mr. Wise was so fatigued by the morning services in 1860 or 1861, that he had to omit services in the afternoon, and have them in the evening, or whether, if such were the facts it would have influenced Dr. Hartman, if known to him, in making up his opinion about recommending him for insurance in 1867, we are at a loss to perceive how the questions at issue between the parties to this case can be affected by it. Mr. Wise was asked no question in regard to it; there is no evidence to show that such a thing ever occurred after he left Philadelphia even if it occurred then, upon which point the evidence is conflicting; it was irrelevant and therefore inadmissible.

The only remaining question to be noticed arises from the refusal of the Superior Court of Baltimore City to remove the case to the Circuit Court of the United States upon the petition of the appellant. It conclusively appears that Mrs. Wise, the appellee, was a citizen of the State of Virginia at the time of the institu-

tion of the suit, and therefore the provisions of the act of Congress, authorizing removals from the State to the Federal Courts, do not apply.

Finding no error in the rulings of the Court below, its judgment must be affirmed.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

WILLIAM M. CLINTON, *Resp't.*,

vs.

THE HOPE INSURANCE CO., *App't.** }

The contract of fire insurance is one of indemnity, and no recovery can be had upon it, unless the assured had at the time of the insurance and of the loss an interest in the insured property.

An administrator takes the legal title to the personal property, but he has no estate in the real property of the intestate.

It is not essential to the validity of a contract of insurance that the person, or persons, to be insured are named in the policy.

If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is unspecified or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract.

Where the agent of the company to whom the application was made was informed that the insurance was desired for the benefit of the widow and heirs of Daniel Ross, and the policy issued by him insured "the estate of Daniel Ross" against loss or damage by fire upon the property, described as a cotton mill building and the fixed and movable machinery therein, the interests both of the administratrix and of the heirs in the insured property were covered.

The provision in the policy requiring a written application by the person seeking insurance, was introduced for the benefit of the company, and if it issued a policy without requiring it, the contract would take effect as though no reference thereto had been made.

A survey and application made several years before upon another application for insurance upon the same property, and referred to in the policy as containing a description of the property to be insured, was no part of the contract between the parties.

A party to a contract seeking to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture. The terms of the contract must be clear and explicit in his favor.

The vendee took possession of the property insured and held it until after the fire, paying \$1,500 down under a contract for the sale of the property for a certain sum, which contract gave him immediate possession, and declared that he should hold the land and personal property as tenant of the estate at a fixed rent until the deed should be executed and delivered. *Held* that the title to the personal property did not pass by the contract. When it was destroyed by the fire it was the property of the vendors in the contract and the loss was theirs.

*Decision rendered April 4th, 1871.

The vendors were disabled to perform the contract in respect to the personal property and the vendee was discharged from the obligation to pay the debt and there was no right of subrogation.

If, as between the parties to the contract of sale, the vendee was entitled to the benefit of the insurance, in case of loss, the company can assert no equity in hostility to that arrangement.

ANDREWS, J.

The contract of fire insurance is one of indemnity, and no recovery can be had upon it unless the assured had, at the time of the insurance and of the loss, an interest in the insured property.

It is claimed by the defendant that the contract upon which the action is brought was made by the Company with the administratrix of Daniel Ross, and in respect to her interest in the insured property, and that no recovery can be had for the loss of the mill mentioned in the policy, for the reason that the administratrix as such, had no insurable interest therein.

If the premises upon which this claim of exemption from liability is based are true, the recovery cannot be sustained.

An administrator takes the legal title to the personal property, but he has no estate in the real property of the intestate.

It was held in *Herkimer vs. Rice*, 27 N. Y. 163, that where the personal estate of an intestate was insufficient to pay his debts, the administrator had an insurable interest in the buildings upon the land of the deceased, on the ground that he is a trustee of a power to sell the land upon the order of the surrogate, for the benefit of creditors, and that as the interest of creditors is the subject of insurance, the administrator may insure for their benefit.

It is admitted in this case that the personal estate of the intestate was more than sufficient to pay his debts, and the administratrix had therefore no interest in the real estate to support a contract of insurance. The defendant, by the policy in question, undertook to insure "the estate of Daniel Ross" against loss or damage by fire, upon property described as a cotton mill building, and the fixed and movable machinery therein. The person or persons to be insured are not named, in the policy, nor is this essential to the validity of a contract of insurance. If the name of the person for whose benefit the insurance is obtained, does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is unspecified or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract, and when thus ascertained it will be held to apply to the interests intended to be covered by it, and they will be deemed to be com

prehended within it who were in the minds of the parties when the contract was made.

1 Phil. on Ins., 163; *Colpoys vs. Colpoys*, Jacob, 451; *Burrows vs. Turner*, 24 Wend., 277; *Davis vs. Boardman*, 12 Mass., 30; *Newson's administrator vs. Douglas*, 7 H. & J., 417.

The evidence leaves no doubt as to the persons intended by the designation, "the estate of Daniel Ross." The agent of the defendant to whom the application was made, was informed that the insurance was desired for the benefit of the widow and heirs of Daniel Ross; the policy was subsequently issued by him, and the language used to designate the assured was inserted by him without instructions from them.

Under these circumstances the rule of construction to which we have referred has a direct application.

It is insisted, however, that the words, "Estate of Daniel Ross," have a definite legal signification, meaning his administratrix, or that the policy is to be continued in the same manner as though she was named as the person assured thereby. This position has some support in the remark of Denis, Ch. J., in *Herkimer vs. Rice*, to the effect, that in common parlance and in legal language, when the estate of a deceased person is spoken of, the reference is to his effects in the hands of his executor or administrator. In that case the question was as to the right of the administrator and the creditors of the intestate on the one side, and the heirs upon the other, to certain money received upon policies of insurance upon the buildings on the land of the intestate, issued directly to the administrator or renewed upon her application. The renewal receipts stated the premium to have been received of the estate of the intestate. In fact, the policies were renewed upon the application of and for the benefit of the administratrix and the creditors, and the court gave effect to the contract according to the intention of the parties.

This case is not, we think, an authority for the claim made by the defendant. The words used in this policy were intended to designate the persons holding the legal title, and to speak of the property left by a deceased person, including the real property, especially before final settlement of his affairs, as his estate, if not accurate, is not an unusual designation. We are of opinion that the interests, both of the administratrix and of the heirs in the insured property, were covered by this policy. 1 Phil. on Ins., 106; *Higgenson vs. Dale*, 12 Mass., 96.

It is claimed on the part of the defendant that the policy in

question was issued upon an application and survey made in 1863, by Daniel Ross, to the Hope Insurance Co., for an insurance upon the same property covered by this policy, and that that application and survey, by the terms of the policy, was referred to and made a part of it, so as to bind the assured by the statements contained therein as warranties, except as they were modified by the endorsement made by the agent of the defendant. In that application and survey it was represented that there was but one building within 100 feet of the mill. In fact, when the policy was issued there was, and had been for some years, several buildings within that distance. There were other statements in the application and survey which were untrue, as applied to the time when this policy was issued. If this survey was made a part of the contract, the policy never attached, as the truth of the statements in the application and survey was a condition precedent thereto. The court held that this application and survey was not a part of the policy, and excluded that question from the consideration of the jury.

In the printed part of the policy it is provided as follows:

"The policy is made and accepted in reference to the survey on file at the office and the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for;" and the conditions referred to, after specifying what the application must contain, including, among other things, a specification of the situation of the property in and with respect to contiguous buildings, declare "that if any survey, place or description of the property herein insured is referred to in this policy, such survey, place or description shall be deemed and taken to be a warranty on the part of the assured." The attestation clause recites that the "Hope Ins. Co. have caused these presents to be executed by their President and attested by their Secretary, at their office in Providence. R. I."

It is apparent from these provisions that it was the practice of the company to require a specific written application, or survey, to be made by the applicant to accompany his proposition for insurance, and that the survey referred to in the condition is the survey mentioned in the body of the policy, as on file in the office of the company, and which was the basis of the contract of insurance. The provision, however, requiring a written application by the person seeking insurance, was introduced for the benefit of the defendant, and if the company issued a policy without requiring it, the

contract would take effect as though no reference thereto had been made.

In this case, no written application was made by the assured, nor was any application relating to an insurance on this property on file in the office of the defendant. The application and survey made by Daniel Ross, in 1863, which enumerated the articles of machinery in the mill, was at the time of the insurance in the possession of the agent of the defendant, at Utica, where it had been from the time it was made. In the part of the policy which describes the property insured, this survey is referred to as follows: "2165, on movable machinery therein, as per survey on file at office of M. K. Thomson, at Utica, N. Y.

This reference to the survey of 1863 cannot, we think, be regarded as the survey mentioned in the printed clauses of the policy. It was a convenient method of identifying the articles of movable machinery covered by the policy, but it did not make the other statements therein a part of the contract.

This survey was not, and had not been on file in the office of the defendant. Nor does the evidence in the case furnish any ground for the inference that the parties understood that the survey of 1863, was to stand as the application for this insurance. It does not appear that the assured had any knowledge of the statements it contained, nor are they chargeable with notice of them. The parties could have made that survey, for all purposes a part of the contract, but this intention is not apparent upon the face of the instrument, nor is it established by extrinsic proof. The party to a contract who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition, by inference or conjecture. The terms of the contract must be clear and explicit in his favor.

There was no error in the ruling of the Court that the survey of 1863, was not a part of the contract between the parties.

It remains to consider the effect of the contract for the sale of the insured property, made by the assured after the policy was issued and the insurance was effected. The heirs of Daniel Ross were the absolute owners of the land, and had an insurable interest in the buildings thereon, commensurate with their real value. They were insured as owners, and such premium was exacted by the defendant, as was deemed equivalent to the risk assured. The contract of May 29th, 1865, was an entire contract for the sale for a gross sum, of the mill and the machinery therein. It was not obligatory upon the

infant heirs, as no order for the sale of their estate had been procured, and their general guardian had no power to contract for the sale in their behalf. It did not become mutually obligatory until confirmed and approved by the Court, by the order of June 8d. The vendee took possession of the property immediately after the contract was executed, under the provision therein giving him immediate possession, and declaring that he should hold the land and personal property as tenant of the estate at a fixed rent, until the deed should be executed and delivered. The vendee paid \$1,500 when the contract was executed, and remained in possession without any new contract until the fire, which destroyed the property.

It is now claimed on the part of the defendant, that by the contract of sale, the vendee became the equitable owner of the land, and trustee for the vendors of the purchase money, and that the contract of insurance became from that time an indemnity for the payment of the unpaid purchase money, and a mere insurance of the debt owing to the vendors to the extent of the policy.

It is then insisted that this relation between the parties to the contract of insurance, entitled the defendant on payment of the loss to be subrogated to the extent of such payment, to the claim of the vendors for the purchase money on the contract, and that the transaction in law was a complete execution of the contract of purchase, and extinguished the liability of the defendant on the policy.

The general rule is that the vendee in a contract for the sale of land, is entitled to any benefits or improvements happening to the land after the date of the contract, and must bear any losses by fire or otherwise, which occur without the fault of the vendor. *Dart on Vendors*, 116; 1 *Sug. on Vendors* 468; *Paine vs. Miller*. C. Ven. 349.

Nor, it seems, is he entitled to the benefit of an insurance obtained by the vendor on his own account, and held for his own benefit. *Stilwell vs. The Jefferson Ins. Co.*, 5 Bos. 261; but see *Ins. Co. vs. Updegraff*, 42, Pa. 513.

And in case of loss by fire, when such an insurance exists, it was said by the Chancellor in *Tyler vs. Etna Ins. Co.*, S. C., 385, in analogy to the rule in case of insurance upon the interest of a mortgage that the insurer, on payment of the loss, is entitled to be subrogated *pro tanto*, to the right of the insured in the unpaid purchase money.

Without conceding the correctness of this doctrine, we think that this case is not within it. The contract of sale was entire. The value of the machinery and personal property formed the

principal part of the purchase money. The mill was useless as such without machinery, and it may be assumed that neither the real or personal property would have been purchased separately. The title to the personal property did not pass by the contract. By the agreement of the parties, the vendor, at the time of the fire, held it as tenant; when it was destroyed by the fire it was the property of vendors in the contract, and the loss was theirs. *Herring vs. Hoppick*, 15 N. Y., 409; *Hasbrouck vs. Lounsberry*, 26 N. Y., 599. They were disabled to perform the contract in respect to the personal property, nor could they under the circumstances compel the vendee to accept a partial performance on their part, and require him to take land. *Bacon vs. Simpson*, 3 Mo. & U. 78. The same event, therefore, which fixed the liability of the defendant to pay the insurance, discharged the vendee from the obligation to pay the debt, to which the defendant claims to be subrogated. Manifestly there was then no right of subrogation.

Nor can the transaction, when the deed was delivered and the payment made, be regarded as an election by the vendee to perform the contract of May 29th. The payment was made, not alone in consideration of the delivery of the deed, but also of the assignment of the claim against the insurance companies. If, however, the contract of sale was in full force after the fire, the defendant was not entitled to subrogation to the claim of the vendors. The original undertaking by the defendant was an insurance of the owner's interest in the property.

By the contract of sale the vendee agreed to repay the vendor the unearned portion of the premium on the policy in question, and to keep the premium received for the protection of any mortgage he should give on the consummation of the sale. The undertaking by the vendee to pay the cost of the insurance, was under the circumstances, equivalent to an agreement on the part of the vendors to hold the insurance for the protection of the joint interests of the parties, and created a privity between them in respect to the contracts of insurance. There can be no other reasonable construction of the transaction. In substance the insurance was furnished by the vendee as an additional security for his debt. If, as between the parties to this contract of sale, the vendee was entitled to the benefit of the insurance moneys in case of loss, the defendant can assert no equity in hostility to that arrangement.

The equity of the defendant is the equity of the vendors, and an arrangement between the vendors and vendee, in respect to the

application of the proceeds of the insurance, did not violate any contract between the insurer and insured. The defendant, upon payment of the indemnity, promised simply to perform his contract. *Kenschaw vs. The N. Y. Bowery Fire Ins. Co.*, 17 N. Y., 428 ; *Insurance Co. vs. Updegraff*, 21 Pa. St. 513.

The judgment should be affirmed

NEW YORK COMMISSION OF APPEALS,

MAY TERM, 1871.

Appeal from General Term New York Superior Court.

SALLY ANN HOWELL, *Appellant*,

vs.

THE KNICKERBOCKER LIFE INS. CO.,* }

The proviso in the policy for its continuance in force beyond the 15th day of July, rendered it indispensable that the requisite premium for another year should have been paid on or before that day. Its payment was a condition precedent to the continuance of the policy for another year.

Although the assured was, when about to pay the premium, rendered incapable by the act of God, she is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power.

The fact that the assured, about two hours before the expiration of the policy, was so fatally stricken by disease that he at once became and remained in a dying condition until the next day, when he died, does not render the company liable under a policy upon his life.

The admission by the defendant that it was its usage to allow the insured party some days of grace within which to pay the annual premium, and that the insurance was effected in reference to that usage, amounted to a proposition to substitute a custom for a plain provision contained in the policy itself, and in clear conflict with its provisions, and hence unavailable to the plaintiff.

A parol agreement made between the company and the assured at the same time the insurance was effected and the policy issued, and in clear conflict with the policy, is void.

An agreement made between the assured and the company, after the assurance was effected and the policy delivered, that if anything should happen to prevent the payment of the premium on the day it became payable, the policy should not become void, but should continue in force for a reasonable time thereafter, so that the premium could be paid, was binding upon the parties.

Where the defendant admitted on trial that at the time the policy was issued it was understood and "agreed" as stated, the court must hold the admission to extend to everything essential to a valid agreement, and must assume that the agreement was in writing.

* Decision rendered May 1st, 1871.

GRAY, C.

The proviso in the policy for its continuance in force beyond the 15th day of July, 1862, rendered it indispensable that the requisite premium for another year should have been paid on or before that day; its payment was manifestly a condition precedent to the continuance of the policy for another year. *Ruse vs. The National Life Ins. Co.*, 23 N. Y., 516, 518. The payment of the premium was an act which could have been performed by any other person than the plaintiff's husband; its payment did not necessarily depend upon his continued capacity or existence; and hence, although he was, shortly prior to the expiration of the policy, when about to pay the premium, rendered incapable by the act of God, she is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power. *Broom's Leg. Max.*, 6th Am. edition, 178, 179, and cases there cited. It is claimed that because Howell was, about two hours before the expiration of the policy, so fatally stricken that he at once became and remained in a dying condition until the next day, when he died, that he was within the meaning of the policy dead before it expired. It must be borne in mind that this is not a policy upon property but upon life. It is not enough that his life was in such peril that no hope was left of a partial recovery, and that so far as his continued existence could have benefitted the plaintiff or her children by any provision he could have made for their comfort, his life to them may, in that respect, have been worthless. It was not against his ill health or against any attack of apoplexy and paralysis or fatal epidemic she was insured, but against his death from any cause other than those excepted in the policy; if it was not so, and he had been, on the day before the policy expired, in the last stage of consumption, and from that cause in a dying condition, and had died the next day after it had expired, the defendant would have been liable. The length of time a diseased man may, before death, be in a dying condition, whether from sudden attack or long disease, is undefined. Howell may have been attacked two days or more before the expiration of the policy, and remained in what is ordinarily understood as a dying condition until a day or more after it expired, and the result would be that in cases of this kind if from satisfactory evidence the jury should find that the life insured was stricken with disease and death two days before the policy expired and lived until after its expiration, the insurer would be liable. And thus in order that a party for whose benefit

a policy is issued, may determine upon his rights under it, his first duty would be to consult the doctor to learn whether his patient is in a dying condition instead of his policy to learn with certainty that if he is alive when his policy expires the insurance will terminate.

The admission that it was the usage of the defendant, in dealing with other persons whose lives it insured, to allow the insured party some days of grace within which to pay the annual premium, and that the insurance was effected in reference to that usage, and that it was understood and agreed between the parties at the time it was effected and the policy issued that if anything should happen to Howell to prevent him paying the premium on the day whenever the same became payable, the policy should not thereby become void, but should continue in full force for a reasonable time thereafter, so that the premium could be paid, was subject to a well grounded objection. It amounted to a proposition to substitute a custom for a plain provision contained in the policy itself, and in clear conflict with its provisions, and hence unavailable to the plaintiff, as was also the parol agreement made at the same time the insurance was effected and the policy issued, and for the same reason. After what was understood and agreed at the time the insurance was effected, there was, on an occasion when an annual premium was paid, the same understanding and agreement, a part of which was that if anything should happen to Howell to prevent his paying the premium on the day it became payable the policy should not become void, but continue in force for a reasonable time thereafter, so that the premium could be paid; this being after the insurance was effected and the policy delivered, was binding upon the parties. The Trustees of the First Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305-307. The admission of this agreement was followed by another, viz.: that by the act of God, Howell was prevented from paying the premium on the day it became payable, and the further admission that the premium was tendered to the defendant within a reasonable time thereafter, and that after the expiration of ninety days from notice of the death of Howell the defendants were requested to pay the insurance and refused to comply with the request. The death of Howell, under the circumstances, rendered the agreement to perform, a waiver of the condition precedent, and the tender within what is conceded to be a reasonable time, followed by the notice and demand of payment, entitles the plaintiff to a reversal of the judgment of the General Term.

EARL, C.

It is stated in the case that the jury, under the direction of the court, rendered a verdict for the plaintiff, "subject to the opinion of the court upon a case to be made by the plaintiff, containing the objections and the exceptions," and that the court further directed "that such objections and exceptions be heard, in the first instance, at the general term." It is somewhat in doubt whether the court intended to direct a verdict subject to the opinion of the general term, or intended to direct a verdict for the plaintiff, and order the exceptions, which the defendant had taken, to be heard in the first instance at the general term. It could not do both, and probably did not intend to, and as this was not a proper case for a verdict subject to the opinion of the general term, it must be held that the court intended to do a right thing and order verdict for the plaintiff, and that a motion for a new trial on the part of the defendant upon its exceptions be heard, in the first instance, at general term. We must so treat it upon this appeal.

The policy of insurance upon which the action was brought contained the clause 'and it is hereby agreed that this policy may be continued in force from time to time until the decease of the said George R. Howell, provided that the said assured shall duly pay or cause to be paid to the said company annually, on or before the 15th day of July, in each and every year, the sum of one hundred and thirty-eight dollars and fifty cents.' On the 15th day of July, 1862, Howell went to his place of business, prepared and intending to pay the said annual premium; but before he did so he was stricken down with paralysis, and died the next day without having made the payment. If the clause which I have quoted from the policy had in no way been modified, I should have no hesitation in holding that the plaintiff could not recover. Payment was a condition precedent to the continuance of the policy, and no mere accident or act of God, however controlling, could continue the policy in force after the pay day, without payment. This could be done only by the agreement or consent of the defendant, properly given, or by some act, which would estop the defendant from denying payment. But at the trial the defendant admitted "that it was understood and agreed, by and between the defendant and the said George R. Howell, at the time the said insurance was affected and the policy was issued and also thereafter, when the annual premium was paid, that if anything should happen to him to prevent his paying such premium on the day whereon the same became payable, the said policy should not thereby become null and void,

but should continue in full force for a reasonable time thereafter, so that the said premium could be paid; that by the act of God he was prevented from paying the said premium on the 15th day of July, 1862, and that the same was tendered and offered to the defendant within a reasonable time thereafter."

Here it is admitted that at the time the policy was issued, it was agreed as stated. We have no right to assume that that was not a valid agreement, as not in writing. As the parties admitted that it was "agreed" we must hold the admission to extend to every thing essential to a valid agreement, and must assume that the agreement was in writing. Hence, this agreement must be construed in connection with, and as really a part of the policy. It was not an agreement that the policy might be revived, after it had been forfeited and became null and void. It was an agreement to continue the policy in force after the 15th of July in any year, for a reasonable time, to enable the premium to be paid. Instead of requiring pre-payment of the premium, it gave a credit for a reasonable time. It was not an agreement which would allow an insurance upon the life of a dead man, but it continued the policy in force, so that there was no forfeiture of the policy or termination of the insurance, provided that payment was made within a reasonable time, no matter whether the person, whose life was insured was dead or alive. Hence, if there was no other agreement than the one here alluded to, there could be no reason for saying that the policy was not in force at the time of the death of Mr. Howell.

But it is further admitted that at a time when the annual premium was paid, the same agreement was made; and I think we must, for the same reason, assume that this was in writing, and this agreement even in the absence of the other one, was sufficient to continue the policy in force, and it would unquestionably have had the same effect if the agreement had been by parol.—*Trustees &c. vs. Brooklyn Fire Ins. Co.*, 19. N. Y., 305. Hence, in any aspect we can view this case, it comes here with an admission, substantially and in effect that the policy was in force at the time of Howell's death. This may be a broader admission than the defendant intended to make. But we must take it as it is and give it all the effect its terms authorize and require; and this leads to a reversal of the judgment of the General Term, and judgment for the plaintiff upon the verdict, with costs.

DISSENTING OPINION.

HUNT, C.

My brethren are of the opinion that the judgment of the General Term in this case should be affirmed, except for the admissions contained in the "tenth" item of the case. I am not able to find a reason in that source for a reversal. It is recited in the ninth item that it was admitted to have been the usage of the Company to allow some extension or days of grace beyond the pay day, within which to pay the annual premium, and that the defendants were accustomed to receive it, and that the policies continued in full force and effect, and that such usage was known to Mr. Howell. The tenth item was as follows, viz: "That it was understood and agreed by and between the defendants and the said George Howell, at the time the said insurance was effected and the policy issued, and also thereafter when the annual premium was paid, that if any thing should happen to him to prevent his paying such premium on the day when the same became payable, the said policy should not thereby become null and void, but should continue in full force for a reasonable time thereafter, so that the said premium could be paid; that by the act of God he was prevented from paying the said premium on the 15th of July, 1862, and that the same was tendered and offered to the defendants within a reasonable time thereafter." It is said that this contains an absolute admission of an agreement that the policy should be and remain in force for a reasonable time after the pay day, whether the party insured continued to live or whether he in fact died before such reasonable time elapsed. The appellant's counsel consider these facts as presenting a fit case for the application of the doctrine of estoppel *is pais*.

The answer given by the respondent's counsel that the original agreement was in writing, that the subsequent agreement being by parol was void, is not satisfactory. It does not appear from the case that this agreement was by parol. And again, a subsequent agreement may be by parol and the original agreement afford a sufficient consideration for a modification.—*Trustees vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; 25 Barb., 189. We must, therefore, look into the agreement itself.

The complaint alleges that Howell did not intend to abandon the insurance, but expected to pay the premium on the 15th of July, 1862, and had made his preparations for that purpose, but was prevented by the sudden and severe illness, which caused his

death. It also avers that the defendants were accustomed to receive the annual premiums on life policies after the time when the same became payable, and to treat the same as valid and effectual payments upon the policy; that this policy was made in reference to that usage, and that it was understood and agreed between defendants and Howell, when the policy was issued, and subsequently, that if any thing should happen to him to prevent his paying when the premium became due, the insurance should not become void, but should continue thereafter, a reasonable time, to allow him to make the payment of the premium. 'Some significance may possibly attach to the averment that Howell himself was to make the payment after the lapse of the time referred to. The intention of the defendants under this usage, and the effect of their agreement, as admitted, are identical. Indeed the agreement was a practical application of the effect of the usage to the case in hand. This would present a case when a life insurance company was in the habit and practice of receiving small premiums for the issuing of large policies of insurance upon the lives of persons already dead. To bring it to the case of Mr. Howell, who, according to this construction, was only one of a numerous class, the case was this. This company agree with Mr. Howell that if he should die on the 15th of July of any year, after twelve o'clock at noon of that day, or within a few days thereafter, if any one on his behalf should then pay to the company the sum of \$138, they would at once issue or reissue a policy upon his life, for one year, for the sum of \$5,000. They would, in short, agree positively to pay \$5,000 for the consideration of \$138. This is the inevitable result of the construction which I am considering. It is agreed that in default of payment at the day "the policy shall not become void, but shall continue in force for a reasonable time thereafter, so that the premium could be paid." "The policy shall continue in force." This, it is said, keeps it in existence as a valid insurance for several days after the death of Mr. Howell, "so that the premium can be paid." This, it is said, provides that when, after his death, the premium shall be so paid, the vitality of the policy continues, so as to compel the payment of the \$5,000. It is, as already stated, an agreement to insure the life of a man, who is dead at the time of making the agreement. On the other hand, the language we are considering is capable of a construction sensible and reasonable. While a practice to insure the life of dead men would be absurd, a practice to extend the time of payment for a few days beyond law day, and then to receive payment from those who continued alive

and in good health, would be sensible and profitable. This is a fair construction of the agreement with Mr. Howell. This insurance when commenced was upon the life of a man of the age of thirty-six years, at an annual premium of \$138. He had paid for nine or ten years. If by failure to pay at the day prescribed, his policy should be declared forfeited, and he should take out a new one, his premium would be much larger than was required by the original policy. He would be compelled to pay a premium of \$200 or \$250. To avoid this result, the company adopted the usage referred to, and made the agreement with Mr. Howell, alleged in the complaint and admitted in the tenth item. The expression "so that the premium could be paid," is in harmony with this construction. While it would be absurd and unreasonable to receive a premium of any amount less than the sum insured, for the life of one already dead, it would be right and just to overlook a few days delay by not exacting an advanced premium, but to continue in force the existing policy at the same annual premium.

Upon the construction contended for, the policy would be without consideration as to all beyond the amount of premium paid. A hands to B, or promises to him, \$100; in consideration whereof B promises to pay A at once \$1,000. What is the consideration for the \$900? I can see none. If A owes B \$1,000, and in consideration of \$100 paid, accepts that amount in full satisfaction of the debt it is no satisfaction. He may immediately sue A for the balance. The principle of the case is the same.

For affirmance, HUNT and LEONARD, C. C.

For reversal, LOTT, CH. C., and GRAY and EARL, C. C.

Judgment reversed, and judgment ordered for the plaintiff upon the verdict with costs.

SUPREME COURT OF MICHIGAN.

IRA MAHEW,
vs.
 THE PHOENIX INSURANCE CO.* }

It is no ground of relief in a court of equity that the assured compromised his loss with the adjuster of the company greatly to his own disadvantage, unless there has been some tangible misconduct on the part of the adjuster of such a nature as to amount to a breach of legal duty.

* Decision rendered April Term, 1871.

Where the adjuster of the company, by disputing the right of the insured to recover of the company on account of his having left his premises vacant, and his right to include various articles of furniture, books, and stationery in his claim, and the amount of the loss influenced him to make a compromise for a much less sum than the real amount of his loss, but, without persuasion, there was no fraud or breach of confidence.

An adjuster of an insurance company, in his relations to the insured having suffered a loss, is the agent of an adverse interest, and presumptively would not be likely to stand in any different position from other persons dealing at arm's length.

The adjuster, upon being inquired of by the insured as to his rights under the policy in case he did not accept the offer of the company, replied that the terms offered would be adhered to, and that he would have to resort to a suit, and did not allude to a provision in the policy for an arbitration. *Held*, That, although the course of the adjuster had an effect in securing an unfair compromise from the insured; yet, as there appeared to be no intention to deceive, there was no fraud or breach of confidence.

The law cannot interfere to supply a lack of firmness in those who allow themselves to yield to the hostile and domineering course pursued by the adjuster, without some further element of misconduct on his part.

The company recovering judgment censured and held to costs, for the act of its adjuster in maliciously charging the insured, in its answer, with having caused the fire.

CAMPBELL, CH. J.

The bill in this cause was filed to obtain relief against a compromise made on a loss under a fire policy, claimed to have been induced by the fraud of the adjusting agent. The compromise was for five hundred dollars, which is claimed to have been but about one-fourth of the real loss.

The fraud set up consists in complainant's having been misled by the acts and representations of one Ireton, the adjuster, in whom he claims he relied, and who is said to have been aware of and abused the confidence. The misrepresentations complained of relate to what were the legal rights of the complainant concerning the classes of property covered by the policy, and the effect of leaving his college rooms closed for more than thirty days—which the agent claimed vitiated the policy. There was also a charge that by concealment of an arbitration clause, and by statements, Ireton induced complainant to believe he could get no redress except by litigation; and it was further set up that complainant was deceived by him in regard to the extent of damage to the property.

The whole burden of the case therefore depends on the breach of duty arising out of confidential relations requiring the utmost good faith in mutual dealings; and there is no class of cases more readily relieved in equity than such abuses.

We cannot but perceive that if complainant was entitled to relief under the policy, he has not been favorably dealt with. He appears to have had a good cause of action, and to have compro-

mised it on terms that no high-minded business man, without strong convictions of its legal doubtfulness, ought to have made. But this of itself is no ground of relief, unless there has been some tangible misconduct of such a nature as to amount to a breach of legal duty, and we think, upon the facts, that the complainant is himself chiefly responsible for his misfortune.

We do not think it necessary to review the facts at length, but we will simply indicate some of the more prominent features of the case. Immediately after the loss, which occurred in September, 1868, while complainant was on a visit in Albion, he returned to Detroit, the local agent at Albion having advised him to leave the premises as they were until the adjuster should come, of whose coming complainant was to be notified. The property insured consisted of various articles used more or less directly in connection with a commercial college which complainant had conducted in Albion up to the preceding May. On the arrival of Ireton an examination was made of the effects, and certain inventories were used for that purpose. Ireton disputed the complainant's right to any thing whatever, on account of the premises being left vacant. He also disputed the right of complainant to include various articles of furniture and stationery and books, and he disputed the amount of damage claimed to have been suffered on various articles. It does not distinctly appear whether or not complainant had made out any statement in dollars and cents except as to the stationery and text-books destroyed. Upon the other articles there seems to have been a rough estimate. Ireton did not propose to go into the details, but offered a round sum of five hundred dollars. Complainant declined and expostulated, but at last this was agreed upon and closed. During the various interviews there is no doubt Ireton gave his opinion positively, and there is as little doubt that complainant was considerably influenced—but not persuaded by them. He acquiesced unwillingly, and did not consider himself justly dealt by. The question is, how far does this show any breach of confidence.

There was in the policy a provision for arbitration in case of difference as to the amount of loss, but not as to any other question. Complainant, during the course of the negotiations, asked Ireton in regard to his rights under the policy, in case he did not accept the sum offered. He was answered that he would have to make out his proofs and present his claim at the Cincinnati office; that it would be referred to Ireton as adjuster, and he would adhere to the terms offered; and if finally dissatisfied he would have his

legal remedy. This was no more than any one else could have told him. There is no reason to believe that the question of arbitration was in Ireton's mind, or that he wilfully concealed the fact that such a clause was in the policy. It was a somewhat arrogant method of expression, and one which doubtless had a certain effect on complainant—but it does not appear to us to have been intended to deceive him. This is the only actual fraud charged beyond the general violations of confidence which we will next refer to.

In order to ascertain how far complainant had a right to demand or expect Ireton to act as his adviser, it is necessary to look somewhat at the situation of the parties. In regard to the actual loss and value of property, complainant had more knowledge than Ireton. He had full means of inspection, and as to all but the library of general literature he had made that inspection. The opinion which Ireton expressed in regard to the damage to that, was given when neither of them had made any close examination, and it is an important fact bearing on the transaction that complainant himself never supposed his loss to have been nearly so great as it really was, until long after the settlement.

Besides having personal knowledge of all the material facts, complainant was in a place where he had intimate and intelligent business friends, and where he had long resided—his departure having been recent.

Ireton was the agent of the adverse interest, and no one of ordinary experience would suppose him likely to forego the interests of his employers. Presumptively he would not be likely to stand in any different position from other persons dealing at arm's length. But he might assume a different position and thus become responsible.

He does not seem to have done this. From first to last he displayed a somewhat hostile spirit, and complainant does not appear at any time to have been convinced that his positions were right. They were, except as to some questions of valuation, assertions of law and not assertions of fact, and while Ireton undoubtedly desired to impress complainant with the difficulty of doing better, it was very far from being done with any idea on either side that he was a friendly adviser, and complainant in his testimony shows that he was influenced in his settlement by a consideration of the inconveniences and delays and expense of litigation, and a very laudable dislike of it. But this is a very different thing from mistaken confidence.

There is no satisfactory evidence that Ireton attempted to prevent complainant from seeking advice, and there is no good reason given why he did not obtain it. He was not among strangers, and he was aware of all the facts. It was his duty as a man of common prudence to seek advice from his own friends, if he had not confidence in himself. There was time and opportunity to take advice, and there was no pressing haste for a settlement at all, before the whole ground should be reviewed. None of his legal rights could be divested by taking time for getting up the proof in the regular way. The whole transaction was one in which there was no need for hasty steps, and it was not common prudence to attempt such a speedy arrangement without knowing at least the extent of the damage. We do not shut our eyes to the common fact that this eagerness to settle is very often stimulated by the sort of peremptory position taken in this case and that this domineering course is a valuable auxiliary to fraud. But the law cannot interfere to supply a lack of firmness in those who allow themselves to yield to such influences without some further element of misconduct. A man who knows, or who has the means of knowing his rights, must under ordinary circumstances be expected to stand upon them. There is no legal fraud or duress in ordinary cases, in declining to comply with a demand without litigation.

We are then forced to conclude that, however unwise this hasty settlement was, it did not result from the abuse of confidence, and was not an actionable fraud.

We cannot properly pass by in entire silence the malicious insinuations in the answer, in regard to the cause of the fire, which originated with the adjusting agent, and are suggested in his testimony, but are destitute of any foundation whatever. Such scandalous matter is out of place and very deserving of censure, and we must hold the company responsible for their agent's conduct. *Forrister vs Read*, L. R. 6, Chancery appeals 40. We shall therefore affirm the decree without costs of this court.

The other Justices concurred.

SUPREME COURT OF KANSAS.

*Error from Leavenworth County.*THE KANSAS INSURANCE CO., *Pl'f in Error.*

vs.

CHRISTIANA BERRY et al., *Administrators of the Estate of Magdalena Berry, Def'ts in Error.**

The court will not disturb a verdict where questions of fact are submitted to the jury with proper instructions, and upon conflicting evidence, because of a mere preponderance of evidence against it. It will only look into the record to see if there was evidence to sustain the verdict, not to weigh it.

Where the court has once fairly given the law on a certain point to the jury, it is under no obligation to give it again because asked by one of the parties.

It is not error to reject papers containing preliminary proofs of loss when another set of the same papers are already in evidence. Nor is it error to reject the same papers when offered in evidence by the plaintiffs in error when copies had not been furnished the other party upon sufficient demand therefor.

A policy of insurance with the application therefor, is *prima facie* evidence of title to the property by the insured, and of an insurable interest therein.

If the whole of an instruction is not correct in its entirety, the court has a right to reject it.

T. A. HURD, *for Plaintiff in Error.*CLOUGH & WHEAT, *for Defendants in Error.*

KINGMAN, CH. J.

This is a proceeding in error to reverse a judgment of the District Court of Leavenworth county, by which Christiana Berry and Magdalena Berry received of the plaintiff in error, \$150, for loss sustained by reason of a fire which destroyed two buildings and a stock of groceries, which the plaintiff in error had insured as the property of the Berrys.

This court has repeatedly decided that where questions of fact are submitted to a jury with proper instructions, and, upon conflicting evidence, that we would not disturb the verdict because of a mere preponderance of evidence against it. We only look into the record to see if there was evidence to sustain the verdict, not to weigh it.

Another principle has been often decided, and is here reaffirmed, and that is where the court has once fairly given the law on a certain

*Decision rendered July 26th, 1871.

point to the jury, it is under no obligation to give it again because asked by one of the parties. These two principles settle most of the questions raised in this case.

It may be well enough to add a few words in illustration of what has just been said. The counsel for the plaintiff in error argued at length that the application for a policy of insurance "being referred to in the policy as forming a part thereof, it becomes a part of the contract and warranty, and the answers made by the insured to the questions in the applications are warranties and as much a part of the policy as though they had been written on the face of the policy, and if untrue avoid the policy." In support of this proposition over a hundred authorities are referred to. On turning to the record we find that at the request of the plaintiffs in error, the court instructed the jury as follows:

"1. That the representations in the application for insurance, made in answer to the questions asked therein, are warranties, and if untrue, avoid the policy." This was one of the main grounds of controversy. The evidence was conflicting. The law was given to the jury as the plaintiffs in error asked. The jury then had the duty of weighing the evidence, passing upon the intelligence and truthfulness of the witnesses, and, finally, of passing upon the issue submitted by their verdict. That duty we shall not wrest from them.

Again, the plaintiff in error asked fourteen instructions in various forms to the effect that if Magdalena Berry owned the property insured and Christiana Berry did not have any interest therein, when the policies were issued, then each of the policies were void and the plaintiffs could not recover, and the refusal to give each of these instructions is pressed in argument in this court as error that ought to cause a reversal of the judgment, and a multitude of authorities are cited in support of the propriety of the instruction. On turning to the record we find this same law was given to the jury twice. Once in the instructions above quoted, for the evidence shows that the Berrys represented themselves as joint owners of the property in the applications for insurance, and in that instruction the jury were told that if the representations were untrue there could be no recovery on the policies; but the court, at the request of the plaintiffs in error, charged definitely as follows:

"2. That before the plaintiffs can recover they must show by the preponderance of evidence, that at the time of making the applications for insurance, the plaintiffs were the joint owners of the property insured, and if the jury find they were not such joint owners, the plaintiffs cannot recover."

Having thus given the law on this point twice, the court was not bound to repeat it thirteen times more, for no reason we can perceive, except that the ingenuity of counsel enabled them to state a simple proposition in so many different forms, and demanded of the court a recognition of that ingenuity. The court acted, probably, from a desire to assist the jury rather than from a lack of appreciation, and our duty seemed to require the same decision. On this point it may be remarked that the evidence seems to justify the verdict.

A specimen only has been given of the errors alleged, of which we cannot take notice. Of those which demand attention there are two; that certain papers containing the preliminary proofs of loss were offered in evidence by the plaintiff in error and rejected by the court. On an examination of the record we find that one set was rejected because the same papers were already in evidence, which is true, and a sufficient reason for excluding them. It seems that the preliminary proofs were twice made out. The plaintiff in error offered one series, which was excluded for the reason given above. Plaintiff in error then offered the other series, which were rejected because the other party had long before demanded, in writing, copies of all papers intended to be used, and these papers had not been furnished. On these facts being made to appear to the District Court, the court refused to allow them to be read in evidence. It is hardly necessary to say that the decision was correct. Sec. 369, Code.

Another error alleged is that the court admitted testimony to vary or contradict the policy. The answer to that is that there is no such testimony in the record. At the request of defendants in error the court instructed the jury "that the policies of insurance, with the applications described in the petition in this action are *prima facie* evidence of title, and of an insurable interest therein, in the plaintiff." It is insisted that this instruction is incorrect. To see just how the jury were directed in this it will be necessary to refer to a previous part of the charge of the court, where the law was laid down to be that possession was *prima facie* evidence of title to property, but that this was open to be rebutted by other evidence in the case; that possession by one as agent raised no presumption of title in the agent, and that it was for the jury to say what the evidence showed as to the ownership of the property; that unless the evidence showed a joint ownership of the property there could be no recovery.

This was a correct ruling on this point. See Nichols and others vs. Fayette Mutual Fire Ins. Co., 1 Allen 63; Fowler vs. New York

Indemnity Ins. Co, 23 Barb., 150. Possession and acts of ownership are always *prima facie* evidence of ownership of property.

The defendant (plaintiff in error), asked a series of instructions, twenty-nine in number, of which the court gave one and refused the others. Fourteen of these have been elsewhere noticed. Of the others, many had been substantially given, such as the sixth and fourteenth; that the keeping of more than twenty-five pounds of gunpowder in the store violated the policy and prevented a recovery.

The 4th, 9th and 10th, in reference to false swearing, are not accurate statements of the law. The law, in relation to that point, had been correctly stated by the court. The 2nd and 11th had already been given. The 3d and 18th are not law, as they are stated, and the same remark applies to the 24th and 28th. With a slight but material change they would have been correct. We may illustrate by a simple observation as to the 24th. That is as follows: "The defendant need not prove beyond a reasonable doubt that the fire was intentional on the part of the plaintiffs, and if the jury believe from the evidence that plaintiffs wilfully, negligently or carelessly allowed their property to be destroyed by fire, so as to procure the insurance thereon; or that any portion of the stock was removed before the fire, they must find for the defendant." Now, the first part of this instruction may be law, the authorities differ about that, but the last clause is neither law nor common sense. If it is law and a man insures a grocery store, he violates the policy if he carries away any part of his stock, no matter how small, or what the motive is. If the whole instruction is not correct in its entirety, the court had a right to reject it. The same is true of the 28th. If the proposition of law is correct, still it would not prevent a recovery for the stock of goods, and the instruction is faulty in saying that the jury must find for the defendant, thus including both policies.

We do not propose to decide anything more than that the court correctly refused the instructions. The 15th instruction is open to the same criticism. If the buildings had been sold by deed, it would not have prevented a recovery on the policy for the goods destroyed. We do not intend to decide that the sale to the county of the property insured so far affected the title that a concealment of that fact in the application vitiated the policy. The instruction refused is so faulty that we cannot decide the question submitted.

It is urged that a new trial should be awarded, because the ver-

dict was for too much. It was certainly authorized by the evidence for the defendants in error. It was too large, according to the testimony of the plaintiffs in error. The jury had all this before them, and we see no reason to disturb their verdict.

The judgment is affirmed.

VALENTINE, J., concurring.

BREWER, J., not sitting in the case.

STATUTE LAWS.

MICHIGAN.

AN ACT To amend sections 6, 24, 26, 28, 29, 31, 33, and 34, of act number 136, of session laws of 1869, entitled "An act relative to the organization and powers of fire and marine insurance companies transacting business within the State," approved April 3d, 1869, and to add two new sections thereto, to stand as sections 40 and 41.

SECTION 1. *The People of the State of Michigan enact, That sections six, twenty-four, twenty-six, twenty-eight, twenty-nine, thirty-one, thirty-three, and thirty-four, of act number one hundred and thirty-six, of the session laws of eighteen hundred and sixty-nine, entitled, "An act relative to the organization and powers of fire and marine insurance companies transacting business within this State," approved April third, eighteen hundred and sixty-nine, be and the same are hereby amended to read as follows, and to add two new sections, to stand as sections forty and forty-one :*

§ 6. The capital stock of any stock company organized under this act shall not be less than one hundred thousand dollars, in shares of fifty dollars each, which capital stock may be increased by a vote of two-thirds of the stockholders, to not more than one million dollars; nor shall any company hereafter organized on the plan of mutual insurance commence business in this State until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars, of which at least five thousand dollars shall have been paid in actual cash, and for the remainder of which notes of solvent parties, founded upon actual and *bona fide* application for insurance, shall have been received. No one of the notes received as aforesaid shall amount to more than five hundred dollars; and no two thereof shall be given for the same risk, or made by the same

person or firm, except where the whole amount of such notes does not exceed the sum of five hundred dollars; nor shall any note be regarded or represented as capital stock unless a policy be issued upon the same within thirty days after the organization of the company taking the same, upon a risk which shall be for no shorter period than three months. Each of said notes shall be payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire, and such incidental expenses as may be necessary for transacting the business of said company; and no note shall be accepted as part of such capital stock unless the same shall be accompanied by a certificate of the clerk of the circuit court of the county in which the person executing such note shall reside, that the person making the same is, in his opinion, pecuniarily good, and responsible for the same in property not exempt from execution by the laws of this State; and no such note shall be surrendered while the policy for which it was given continues in force. But no company organized on the plan of mutual insurance, and insuring against any other risk mentioned in section one of this act, shall hereafter do any business, or take any risks, or make any insurance in any more than two counties in this State, which counties shall be contiguous, and which counties in the case of companies hereafter organized, shall be named and set forth in their articles of association, and in the statement required by section three to be filed in the office of the Secretary of State. No fire insurance company organized under this act, or transacting business in this State, shall expose itself to any loss on any one fire or inland navigation risk, or hazard, to an amount exceeding ten per cent. of its paid up capital, nor shall any fire insurance company organized under the laws, or by authority of any foreign government, expose itself to any loss on any one fire or inland navigation risk, or hazard, to an amount exceeding ten per cent. of its deposit capital in the United States.

§ 24. All insurance companies, associations, corporations, partnerships, or individuals transacting the business of fire or fire and marine insurance in this State, incorporated by or organized under the laws of any other State of the United States, shall make annual statements to the Secretary of State, in such manner and on such detailed forms as may be prescribed or furnished by him, of their condition and affairs upon the thirty-first day of December preceding, on the first day of January in each year, or within thirty days thereafter. Companies, associations, corporations, partnerships, or individuals incorporated and organized under the laws

and authority of any foreign government, authorized to transact business in this State, shall be required to make and file their annual statements on the first day of June in each year, or within sixty days after their annual meeting, as specified in their respective charters or acts of incorporation. They shall also cause to be made out and filed supplementary annual statements of their business in the United States for the year ending the thirty-first day of December, on the first day of January in each year, or within sixty days thereafter. Such supplementary reports shall be made out in the same manner as the reports required from companies organized under the laws of other States of the United States, and the managers, resident directors, or general agents for the United States shall, for the purposes of making such supplementary reports, be deemed the legal and proper officers of such companies or corporations.

§ 26. It shall be the duty of the Secretary of State, as often as once in six months, to appoint one or more competent persons, not officers of any fire insurance company doing business in this State, to examine into the affairs of any fire insurance company incorporated under any law of this State, and whenever he shall deem it expedient so to do, to examine into the affairs of any such company, incorporated or organized under the laws of any other State of the United States, doing business by its agents in this State; and it shall be the duty of the officers or agents of any such company doing business in this State, to cause their books to be opened for the inspection of the person or persons so appointed, and otherwise to facilitate such examination so far as it may be in their power to do; and for that purpose the said Secretary of State, or the person or persons so appointed by him, shall have power to examine, under oath, the officers and agents of any company relative to the standing and condition of said company; and whenever the said Secretary of State shall deem it for the interest of the public so to do, he shall publish the result of such investigation in one or more papers in this State; and whenever it shall appear to the said Secretary of State, from such examination, that the assets of any company incorporated under any law of this State are insufficient to justify the continuance in business of any such company, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such period as he may designate in such requisition, and in case any such company shall fail to pay in and make good the full amount of such deficiency, within thirty days after such requisition and direction as

aforesaid, it shall be the duty of the Secretary of State to give notice of such failure in some newspaper published in the county where the office of such company is located by its charter; such notice shall contain a brief statement of the fact of such failure to comply with this section, and shall be published in such paper once in each week for three successive weeks. It shall not be lawful after the first publication of such notice for such company to issue any policy of insurance, or to make any contract for the same, or to transact any business under its charter, except to close up its business; and all contracts of insurance and policies issued after such first publication of such notice shall be void and of no binding force, and the person or persons making such contracts or issuing such policy shall be liable, in an action of trover, to the person assured in double the sum named as premium in such contract or policy, and the Secretary of State may apply to any circuit court in the State, or if in vacation to any judge thereof, for an order requiring them to show cause why the business of such company should not be closed and a receiver appointed of its assets and funds, and the court or judge shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of such court, or the judge thereof, on the hearing of such proofs, that the assets and funds of such company are not sufficient, as aforesaid, or that for any cause such company is not entitled to transact business in this State, the said court or judge thereof shall decree a dissolution of such company, and a distribution of its effects. The said court or judge thereof shall have power to refer the application of the Secretary of State to a referee, to inquire into and report upon the facts stated therein. Upon any such investigation before such court, judge or referee, the report of the persons appointed by the Secretary of State to examine into the affairs of such company shall be *prima facie* evidence of the facts therein contained. The corporate existence of such company may be proved, if necessary, by a copy of the articles of association, with a certificate of the Secretary of State attached, that such copy is a duplicate of the copy on file in his office. It shall be the duty of the prosecuting attorney of the county where such proceedings are instituted, on application of the Secretary of State or the Attorney-General, to appear for the people and prosecute the same.

§ 28. And it is hereby declared that in the event of any additional losses accruing upon new risks, taken after the expiration of the period limited by the said Secretary of State in the aforesaid requisition for the filling up of the deficiency in the capital and

assets of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof. And if, upon such examination, it shall appear to the said Secretary of State that the assets of any company chartered on the plan of mutual insurance under any law of this State, are insufficient to justify the continuance of such company in business, it shall be his duty to proceed in relation to such company in the same manner as is herein required in regard to joint stock companies; and the trustees or directors of such company are hereby made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by the said Secretary of State for filling up the deficiency in the capital and assets of such company, and before such deficiency shall have been made up. Any transfer of the stock of any company, organized under this act, made during the pending of any such investigation, shall not release the party making the transfer from his liability for losses which may have accrued previous to the transfer. All the provisions of section twenty-six of this act shall apply to any company chartered on the plan of mutual insurance under the laws of this State; and whenever it shall appear to the said Secretary of State that the affairs of any company not incorporated by the laws of this State are in an unsound condition, he shall revoke the certificates granted in behalf of such company, and shall cause a notification thereof to be published in some paper of general circulation in this State for four weeks; and the agent or agents of such company are, after such notice, required to discontinue the issuing of any new policy, and the renewal of any previously issued; and the agent or agents of any such company not incorporated by the laws of this State, who shall issue any new policy, or make any contract for the same after such publication, shall be liable in an action of trover to the persons assured in double the sum named as premium in such policy or contract.

§ 29. Every penalty provided for by this act, or by any other act heretofore enacted by the Legislature of this State relating to insurance, shall be sued for and recovered in the name of the people by the prosecuting attorney of the county in which the company or the agent or agents so violating shall be situated; one-fourth of said penalty, when recovered, shall be paid to the party making the complaint, and the remainder shall be paid into the treasury of said county; and in the case of the non-payment of such penalty the party so offending shall be liable to imprisonment for a period not exceeding six months, in the discretion of any court having cogni-

same thereof; such penalties may also be sued for and recovered in the name of the people, by the Attorney General, and, when sued for and collected by him, shall be paid into the State treasury.

§ 31. The certificates of authority required by section twenty-three of this act, and all necessary duplicates and copies shall be furnished to the several companies by the Secretary of State without charges or fees, but every county clerk may demand and receive for every such certificate filed in his office under this act the sum of twenty-five cents.

§ 33. The necessary expenditures of any examination made or ordered to be made by the Secretary of State under this act shall be certified to by him, and paid on his requisition, by the company which is the subject of such examination, not exceeding five dollars per day and expenses: *Provided*, That cost and expenses of the examination of any company incorporated under the laws of any other State, or any foreign government, the central or general office of which is outside this State, shall be certified by the Secretary of State to the Auditor General as proper and reasonable, and upon the receipt of such certificate the Auditor General shall draw his warrant for the same, payable out of the general or contingent fund of the State, and the State Treasurer on the presentation of any such warrant, is hereby authorized and directed to pay the same.

§ 34. Any fire insurance company, association, or partnership incorporated by or organized under the laws of any other State, or any foreign government, doing business within this State, shall as a condition precedent to the renewal of an annual certificate by the Secretary of State, make and file in the office of the State Treasurer, annually, in the month of January of each year, on oath or affirmation, a statement of the number of fire policies issued by its agents, and procured by or written for sub-agents, solicitors, or brokers, upon property owned by residents of, or situate in the State of Michigan; also, a like statement of the marine insurance business transacted in the State of Michigan, and the gross amount of premiums received or secured thereon, during the year then terminated; and shall pay into the hands of the State Treasurer a specific tax of three per cent. on the gross amount of all premiums received in money or securities during the said year, which said specific tax may be recovered from any company neglecting or refusing to pay the same, in any court at the suit of this State, and shall be and hereby is appropriated to the same uses and purposes as the specific tax on such corporations are or hereafter may be; and it shall be the duty of the

State Treasurer to give his receipt for all moneys paid into the State treasury under the provisions of this act.

§ 2. The following additional sections shall stand as sections forty and forty-one of said act, and shall read as follows :

§ 40. Any company formed under this act shall have the power to amend its articles of association at any regular meeting of the stockholders or members called by the directors for that purpose ; but notice of such meeting, and of the purpose for which it is called, shall be served on each of the stockholders, or, if it is a mutual company, on each of the members, either personally or by directing the same through the postoffice, to the last known post-office address of such stockholder or member, at least three weeks previous to such meeting. But such amendments shall not take effect until submitted to the Attorney General, and certified by him not to conflict with the constitution or laws of this State, nor until a copy thereof, signed by the president and secretary of the company, shall be filed in the office of the Secretary of State, and of the county clerk where the original articles were filed.

§ 41. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 3. This act shall take immediate effect.

Approved April 12, 1871.

MISCELLANEOUS.

IN order that we may hereafter be out on time we issue this number of the JOURNAL in advance of the December and January numbers, which will appear in the course of a few weeks. This arrangement will also be of advantage in enabling us to finish the Reports and Statute Laws for 1871, without extending them too far into the present year. While we are under the necessity of asking the indulgence of our subscribers for this and past delays, we shall endeavor in other respects to fully meet their expectations in regard to the JOURNAL.

WE publish among the recommendations of the JOURNAL, a letter sent us, unsolicited, by Chief Justice Christiancy, of Michigan. Such a compliment from such a source we highly appreciate. It is our ambition and endeavor to give the JOURNAL, among other things, a character for reliability, and we intend to make each number, not only equal to, but an improvement upon preceding ones.

EFFECTS OF THE CHICAGO FIRE ON INSURANCE COMPANIES.

Immediately after the occurrence of the late fire, which destroyed so great a part of the City of Chicago, there was a general mobilization of the forces in the State Insurance Departments for the purpose of determining, as speedily as possible, the extent to which the losses suffered had changed the financial conditions of the fire companies doing business within their several jurisdictions.

The result of the inquiries in Massachusetts are made the subject of a special report by Commissioner Clarke of that State. He says :

"Some of the most intelligent estimates of loss by the recent conflagration at Chicago, reach an aggregate of not less than one hundred and fifty millions of dollars ; while others claim a loss of

two hundred millions and more. From information gathered upon the spot, and from careful investigations of all the insurance returns and numerous other data thus far accessible, our own estimate falls a little short of one hundred and forty millions, including merchandise and household goods, public and private buildings, and other miscellaneous property usually accumulated in a great and thriving city. Of the whole amount more than eighty millions, or fully sixty per cent., was insured, involving to a greater or less extent nearly two hundred and sixty insurance companies, or three-fourths of all the insurance companies doing business in the United States. At the date of this report (December 8th) more than sixty of the companies thus affected have been forced into absolute failure, while nearly as many more have been compelled to adopt measures for the immediate restoration of capital or assets, often impaired far beyond the minimum limit of solvency."

"From the statements received the following tabulations have been collected, the losses reported being in a few instances estimated as nearly as possible, in others based upon partial adjustments, and in some stated at the full amount insured. These results exhibit the condition of those companies only, which have been involved, no occasion existing for any further enumeration."

The following summary is taken from the tabulations of the report:

MASSACHUSETTS.

COMPANIES THAT SURVIVE AND ARE SOLVENT.

Bay State,	Merchants,
Boylston,	National,
City,	Neptune,
Eliot,	North American,
First National,	People's,
Fireman's,	Shoe & Leather Dealer's,
Franklin,	Springfield F. & M.,
Howard,	Suffolk,
Lawrence,	Fremont,
Manufacturers,	Washington.

Total Assets.....	\$ 14,533, 407 00
Chicago Losses.....	\$1,668,500 00
Gross liabilities including Chicago losses.....	4,584,394 00

Surplus as regards policy holders\$ 9,949,013 00

COMPANIES THAT HAVE BECOME INSOLVENT.

Hide & Leather,	New England Mutual Marine,
Independent,	

Total Assets.....	\$ 1,816,593 00
Chicago losses.....	\$ 2,722,000 00
Total gross liabilities, including Chicago loss.....	3,504,586 00
Deficit.....	\$1,687,993 00

COMPANIES FROM OTHER STATES THAT SURVIVED AND ARE SOLVENT.

MAINE.

Eastern, National,	Union,
Total gross assets.....	\$ 1,157,756 00
Chicago losses.....	\$48,500 00
Gross liabilities including Chicago losses.....	486,646 00
Surplus.....	\$ 671,100 00

RHODE ISLAND.

Merchants,	Naragansett,
Total Gross Assets.....	\$ 1,125,430 00
Chicago losses.....	\$30,000 00
Gross liabilities including Chicago losses.....	892,112 00
Surplus.....	\$ 743,318 00

CONNECTICUT.

Ætna, Hartford.	Phoenix,
Total Gross Assets.....	\$ 10,858,891 00
Total Chicago Losses.....	\$5,100,000 00
Gross liabilities including Chicago losses.....	8,866,574 00
Surplus.....	\$ 2,002,317 00

NEW YORK.

American Exchange, Citizens, Columbia, Commerce N. Y. City, Commercial, Continental, Firemans, Germania, Guardian.	Home, International, Merchants, Mercantile, Niagara, Phoenix, Republic, Tradesman's,
Total Gross Assets.....	\$ 18,120,644 00
Total Chicago losses.....	\$5,293,132 00
Gross liabilities including Chicago losses.....	10,309,962 00
Surplus.....	\$ 7,810,683 00

PENNSYLVANIA.

Fame, Franklin,	Ins. Co. of North America, Union Mutual.
Total Gross Assets.....	\$ 6,992,765 00
Total Chicago losses.....	\$ 1,077,000 00
Gross liabilities including Chicago losses.....	3,775,703 00
Surplus.....	\$ 3,217,042 00

OHIO.

Home,	Sun,
Total Gross Assets.....	\$ 999,479 00
Total Chicago losses.....	\$ 470,000 00
Gross liabilities, including Chicago losses.....	\$ 672,000 00
Surplus.....	\$ 327,479 00

CALIFORNIA.

Fireman's Fund,	Union,
Total Gross Assets.....	\$ 1,716,499 00
Total Chicago losses.....	\$ 850,000 00
Gross liabilities, including Chicago losses.....	\$ 1,219,861 00
Surplus.....	\$ 496,608 00
Amount of loss by companies that have made no or impartial returns.....	\$7,637,500 00

COMPANIES WHOSE CERTIFICATES OF AUTHORITY HAVE BEEN REVOKED
SINCE THE FIRE.

NEW YORK.

Aetna,*	Lamar Fire,*
Albany City,	Lorillard
Astor Fire,	Manhattan,
Atlantic Fire,	Market Fire,
Buffalo City,	North American Fire,
Buffalo Fire and Marine,	Security Fire,
Capital City,	Washington,*
Excelsior,	Western,
Fulton,	Yonkers and New York.
Irving,	

RHODE ISLAND.

American	Providence Washington.
Atlantic Fire and Marine,	Rodger Williams.
Hope.	

* Reinstated in New York and re-opened business on the 27th of December—*Insurance Monitor*.

CONNECTICUT.

Charter Oak,
City Fire,
Connecticut Fire,
Merchants.

North American Fire,
Norwich Fire,
Putnam Fire,

PENNSYLVANIA.

Enterprise,

Lycoming.

CALIFORNIA.

Occidental,
Pacific.

Peoples,

ILLINOIS.

Merchants.

The list of companies from other States authorized to do business in Massachusetts and regarded as solvent is as follows:

CONNECTICUT.

Ætna,
Fairfield County Fire,
Hartford Fire.

Hartford Steam Boiler Insp'r
Phoenix.

NEW YORK.

American Exchange,
Arctic,
Atlantic Mutual,
Brewers and Maltsters,
Citizens,
City Fire,
Columbia Fire,
Commerce, of Albany,
Commerce Fire,
Commercial Fire,
Commercial Mutual,
Corn Exchange,
Continental,
Fireman's,
Germania Fire,
Glen's Falls,
Great Western,
Guardian Fire,
Hanover Fire,

Hoffman Fire,
Home,
Hope,
International,
Mercantile Fire,
Mercantile Mutual,
Merchants,
National Fire,
Niagara Fire,
Orient,
Phoenix Fire, of Brooklyn,
Relief Fire,
Republic,
Standard Fire,
Star,
St. Nicholas,
Tradesman's Fire,
Watertown Fire,
Westchester Fire.

MAINE.

Eastern, Bangor,
National, Bangor.

Union, Bangor,

RHODE ISLAND.

Equitable Fire and Marine,
Merchants, \

Narragansett,
Newport Fire and Marine.

PENNSYLVANIA.

American Fire,
Delaware Mutual Safety,
Fame,

Franklin Fire,
Insurance Co. of N. America.
Union Mutual.

OHIO.

Alemania,
Andes,

Home,
Sun.

CALIFORNIA.

Fireman's Fund,

Union.

FOREIGN COMPANIES.

Commercial Union,
Imperial Fire,
Liverpool, London & Globe,

North British and Mercantile,
Queen,
Royal.

The above is a condensed statement of the more important items of this report.

The following list of suspended companies not mentioned in the report, because not doing business in Massachusetts, is taken from the report of the Illinois department and from other sources. Other companies not mentioned will probably be compelled hereafter to suspend.

NEW YORK.

Beekman.

MARYLAND.

Merchants and Mechanics.

OHIO.

Cleveland,
Commercial Mutual,
German.

Hibernian,
Teutonia.

ILLINOIS.

Aurora,
Chicago Fire,
Chicago Fireman's
Commercial,
Equitable,
Garden City,
Germania.

Home,
Illinois Mutual,
Knickerbocker,
Mutual Security,
Republic,
Security,

MISSOURI.

Globe Mutual,

Chouteau.

CASES REPORTED.

This number of the JOURNAL contains a full report of the decisions in nine insurance cases.

The Merchants Ins. Co., of Chicago, vs. Paige, just decided in the Supreme Court of Illinois, was a suit for \$1500, the amount advanced by the insured, who were commission merchants, on 73 barrels of dried fruit, "lost or not lost," shipped from Cleveland to Chicago on the propeller Wabash. The boat was sunk about midnight on June 5th, and notice of the fact was published in the morning papers of the 7th. That morning, appellees received a telegram from the consignors, at Cleveland, directing them to insure, and they applied to the Secretary of the appellant and were refused. They then applied to the Republic Ins. Co. to procure the insurance for them, and Stewart, the agent of that company, applied to one Bruce to take it, who declined, telling him the Wabash was sunk and that his goods were probably on board. Stewart went immediately to the agent of the appellant and obtained the insurance without communicating the information he had obtained from Bruce. The court held that he was bound to give the agent from whom he obtained the insurance the information he had received from Bruce.

Heiman vs. The Phoenix Mut. Life Ins. Co., arose upon a policy of insurance upon the life of the plaintiff's husband for her benefit. When the agent of the company called to deliver the policy and collect the premium, he was absent, having left his business in charge of his son, who signed and gave a note to the agent for part payment of the premium, who said he would wait for the cash part of the premium until the father got home, and would keep the policy good till then, but did not deliver it. The father died soon

after without returning. The court affirmed the action of the court below in favor of the company, and held that after the application was made, and before the policy was delivered there was no contract, and that the making and forwarding of a policy by the company to its agent, and the presentation of the policy to the agent of the party making the application, was not evidence of a contract to insure but a willingness to enter into such contract on payment of the premium.

In *Williams vs. The Washington Life Ins. Co.*, the Supreme Court of Iowa held that where the policy provided that the payment of premiums should be made at the office of the company, "or to agents when they produce receipts signed by the President or Secretary," it was not necessary to show that an agent of the company presented a receipt for the premiums, and that payment was neglected or refused.

The case of *The Howard Fire Ins. Co. vs. The N. & N. Y. Transportation Co.*, in error from the United States Circuit Court for the District of Connecticut was decided in the United States Supreme Court. The boat was insured against fire. By a collision she was so injured as to partially sink, but the goods stored on the main deck would have prevented her sinking entirely had not the steam generated by the water running into the furnace blown the fire out, and set fire to the boat, which burned until the boat sunk. The Supreme Court held that the fire was the efficient predominating cause, and the one nearest the catastrophe, and the one which directly contributed to all the damage done after the boat had partially sunk, and that the company was liable for such damage.

In the case of *Mayhew vs. The Phœnix Ins. Co.*, the Supreme Court of Michigan decide that an adjuster of an insurance company, in his relations to the insured party who has suffered a loss is the agent of an adverse interest and presumptively does not stand in any different position from other persons dealing at arm's length, and that if the insured has compromised his claim greatly to his own disadvantage, it is no ground of relief unless the adjuster has been guilty of misconduct amounting to a breach of legal duty. While the chief justice thinks the insured had been unfairly dealt with, he remarks that the law cannot interfere to supply a lack of firmness to those who allow themselves to yield to the hostile and domineering course pursued by the adjuster, and administers a just rebuke to the adjuster for maliciously charging the insured, in the pleadings, with having caused the fire; by compelling the company to pay the costs of the suit.

In *The Kansas Ins. Co. vs. Berry et al* the Supreme Court of Kansas decide that a policy of insurance with the application therefor is *prima facie* evidence of title to the property by the insured, and of an insurable interest therein.

The *Mutual Benefit Life Ins. Co. vs. Wise*, decided in the Maryland Court of Appeals, is a case that excited great attention, at the time of the trial, on account of the parties interested and the amount involved. The assured was a son of Gov. Wise, of Virginia, and the amount of the insurance was \$20,000. He had been a chaplain in the Confederate army. That fact, however, does not seem to have been very efficiently urged, as a defense in the lower court. The Court of Appeals held that the questions asked in the declaration, were not warranties but representations made material by the agreement of the parties, and that the truth of these representations alone, and not their materiality, was open to the consideration of the jury; and that it was a question for the jury to decide, whether a chaplain in the army is in the military service or not, and whether the assured, if in the military service, was ever actually employed in such service. The judgment in the court below, in favor of the plaintiff, Mrs. Wise, and against the company, was affirmed.

In the case of *Clinton vs. The Hope Insurance Co.*, decided in the Court of Appeals of New York, several interesting questions in regard to the right of an administrator to insure property, and the parties intended in the policy arose, and also in regard to the effect of a contract to convey the insured property.

The case of *Howell vs. The Knickerbocker Life Insurance Co.* was decided in the New York Commission of Appeals. The assured, on the day the premium and policy upon his life became due, while intending to pay the premium, was stricken with paralysis, and died without paying it. The court held that this case is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power, and that, although the assured was in a dying condition when the time for the payment of the premium expired, the company was not liable under the policy. Judgment was, however, given for the plaintiff, under a parol agreement, that if anything happened to prevent the payment of the premium when due, the policy should continue in force for a reasonable time.

INSURANCE LEGISLATION.

Michigan.—This act relates to fire and marine insurance, and is an amendment of an act passed in 1869.

It provides that no stock company, organized under the act, shall

have less than \$100,000 capital. And that no mutual company shall be organized until agreement have been entered into with at least two hundred applicants, the premiums upon whose policies shall amount to not less than \$25,000, of which at least \$5,000 shall have been paid in cash and the remainder in notes. Careful provisions are made in regard to the character of these notes. No fire company organized or doing business in the State shall expose itself on any one risk to an amount exceeding ten per cent. of its paid up capital; nor shall any foreign company so expose itself to a greater amount on its deposited capital in the United States. Companies from other States are required to make annual statements of their condition and affairs. Foreign companies are also required to file annual statements. It is made the duty of the Secretary of State, as often as once in six months, to appoint one or more competent persons to examine into the affairs of the fire companies organized in the State, and whenever he may consider it necessary, he is to investigate the condition of companies from other States, and full power is given him to wind up companies incorporated in the State, and to revoke the certificates of companies from other States, in case they are found to be unsound.

Detailed provisions are made in regard to the course to be taken in winding up companies, and for the punishment of persons and companies persisting in continuing business contrary to law. Certificates of authority are to be furnished without fees, and the cost of the examinations of companies is not to exceed five dollars per day and expenses; all companies organized out of the State are required annually to furnish a statement of the number of fire policies issued in the State of Michigan and a statement of the marine business done in the State, and to pay a tax of three per cent. on the gross amount of all premiums received during the year. Provision is also made for the amendment of their articles of association by insurance companies. The act took effect April 12th, 1871.

BOOKS RECEIVED.

CINCINNATI SUPERIOR COURT REPORTER, Vol. 1, Number 11. Edited by Chas. P. Taft & Bellamy Storer, Jr., of the Cincinnati Bar. Robert Clarke & Co., Cincinnati, 1871.

OUTLINES OF AN INTERNATIONAL CODE, by David Dudley Field. Baker, Voorhis & Co., New York, 1872.

We are under obligations to Commissioner Clarke, of Massachusetts, for his Special Report upon the Condition of Fire Companies doing business in that State as affected by the Chicago fire.

Also to Hon. W. C. Webb, Superintendent of Insurance of Kansas, for a copy of his first annual report.

Hon. David Dudley Field will accept our thanks for a copy of
OUTLINES OF AN INTERNATIONAL CODE.

TRANSFER OF INSURED PROPERTY—BANKRUPTCY.—The following abstract of an opinion delivered in the case of *Perry vs. The Lorillard Ins. Co.*, by Mullin, P. J., at general term of the New York Supreme Court, is from the *Albany Law Journal*.

"Action on a policy of insurance. On trial plaintiff was non-suited. The policy in question was issued to one Cochran, who was the owner and in possession of the premises described in the policy, and the loss, if any, was made payable to the plaintiff. The policy contained the following clause, viz.: 'That if the property shall be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company, etc., then, and in every such case, this policy shall be void.' In January, 1870, Cochran, on the petition of his creditors, was adjudged a bankrupt, and an assignee of all his property was duly appointed and the said assignee took possession. In May, 1870, the property insured was destroyed by fire. *Held*, that the adjudication and assignment in bankruptcy changed the title to the property insured within the meaning of the terms of the policy, and was, for that reason, a breach of the condition, and the policy was therefore void. New trial denied."

COVENANT TO INSURE IN TRUST DEED.—We take the following syllabus of an opinion in the case of *The Sands Ale Brewery Co. In Bankruptcy*, rendered by Judge Blodgett in the United States District Court for the Northern District of Illinois, from the *Chicago Legal News*, in which the opinion is given in full. The case arose on the petition of the trustee, under a trust deed, for an order on the assignee of the estate of the bankrupt to pay over to him the proceeds of certain policies of insurance.

- 1.—*Covenant to Insure—Rights of Mortgagor and Mortgagee.*—The grantor covenanted, in a trust deed given to secure the payment of money, to insure and keep insured in a company, to be selected by the grantee, etc.; and the grantor did insure for one or two years as directed by the grantee, and did assign the policies, but after that time insured the premises without the direction of the grantee, in his own name for near their insurable value, and became a bankrupt; *Held*, that the covenant by the bankrupt to insure operated to assign in equity to the grantee in the trust deed, the benefit of any insurance effected by the bankrupt on the mortgaged property.

- 2.—*Creditors Bound to Take Notice.*—That creditors, who have trusted the bankrupt, must be held to have done so with full notice of the covenant to insure and of the legal and equitable effect of that covenant.
- 3.—*Covenant to Insure.*—That a covenant in a trust deed or mortgage runs with the land as much as a covenant to repair or rebuild, or for another term, because it is a charge upon the land.
- 4.—*Rights of Assignee.*—That the assignee in bankruptcy in this case can hold nothing, which the grantor in the trust deed could not have held if bankruptcy had not intervened.—*Ed. Legal News.*

SUPERINTENDENT MILLER—LEGISLATIVE INVESTIGATION.—The Legislature of New York are causing an investigation to be made of the administration of Superintendent Miller. The following resolution passed the Senate, and a similar one was adopted by the House. A sub-committee are now engaged in investigating charges in the City of New York:

“Whereas, It has been alleged that the Superintendent of the Insurance Department has, during his incumbency, subjected all or nearly all the life and fire insurance companies doing business in this State to an investigation, for the ostensible purpose of ascertaining their solvency; and has imposed, contrary to law, heavy charges for such examinations, generally made by the deputy, and in the case of some companies repeated at brief intervals; it is therefore

Resolved, That the said Superintendent Geo. W. Miller, is hereby requested, with all convenient speed, to make a return to the Legislature, containing an exact statement of the number and names of all the companies he has examined, in person or by deputy, during his term, including also the dates of such examinations, their repetition, their purpose, whether merely to ascertain the solvency of the companies, or their fitness to be admitted into the State, the name of the deputy employed, the time occupied in making such examinations, the amounts charged, and the sum actually received from such investigations by himself and his deputies, the manner in which each payment was affected, and how much was received directly from the companies, and how much from their counsel.”

WM. B. CARDNER, *alias* J. P. THOMPSON.—The following has just appeared in the *Missouri Democrat*:

COMMISSIONER OF IMMIGRATION.

“Wm. B. Cardner, of No. 3 Corningham road, Shepherd’s Bush, London, has been appointed by the Governor, Commissioner of Immigration for Missouri, without pay or emoluments. His appointment was asked by Frank Blair and others, on the ground

'that a residence in Missouri of several years has given Mr. Cardner a most thorough knowledge of our institutions and of the products and resources of our great State; that his abilities are of such a high order as to render certain the most happy result from his efforts in directing emigration from Europe, especially from the United Kingdom of Great Britain and Ireland, to this State,' etc."

Who is Wm. B. Cardner, and what is the significance of the above article? Wm. B. Cardner is J. P. Thompson, the originator of the Life Association of America, its first Secretary, and until a few months since its Manager. But owing to smothered rumors concerning his history and identity, and on account of the necessity the officers of the Association were under that some one should go forth into the wilderness, as did the victim in the ancient Levitical rites, it was deemed expedient that J. P. Thompson should depart, which he did, not only bearing his own and the Association's burdens, but with the declaration by the officers of the company, that, owing to his unjustifiable acts, his connection with themselves and the company had been permanently terminated by them. Mr. Blair, previous to his promotion to the position he now occupies, was acting as agent of the Association, and has since been chosen a director, and the indications now are that the apparent rupture between the trustees and officers of the Association and Mr. Thompson was not so serious as at first appeared, and that an open reconciliation may yet take place. About these times, as the Almanac would say, look out for complimentary articles in certain quarters, and for shrewd devices, calculated so to adorn the reputation and exalt the abilities and virtues of Mr. Cardner as to render his return to the field of his former usefulness practicable to the Life Association of America and tolerable to the people.

A NEBRASKA paper gives the following as the mode of arriving at the measure of damages in Nebraska: Thos. Reilly having plead guilty to an assault upon Reuben Sanders, the Justice asked Sanders to stand up, as it was the custom in that region to place the amount of fine in proportion to the amount of smash. On Sanders placing himself in upright posture, the court exclaimed, in apparent surprise, "Why you don't appear to be much hurt?" To which the complainant replied, "Oh no, he didn't hurt me any—only struck me a few times." "Well," replied Squire S—— very gravely, but with evident disgust, "When this court strikes a man he always carries a black eye."

THE case of *Miller vs. The Mutual Benefit Life Ins. Co.*, reported in the JOURNAL, p. 25, has been retried in the Delaware Circuit Court, Iowa. The plaintiff received judgment for the amount of the policy and interest, \$5,900.

HON. HIRAM WARNER has been confirmed by the Georgia Legislature as Chief Justice of the Supreme Court of that State, and Governor Smith has appointed Hon. W. W. Montgomery, Judge of the Supreme Court, to fill a vacancy.

SAMUEL HAND, Esq., Reporter of the Court of Appeals of New York, has resigned that position and Hiram G. Sickles, Esq., has been appointed to the position.

HON. WARREN CURRIER has resigned his position as Judge of the Supreme Court of Missouri, and Hon. Washington Adams has been appointed in his place.

THE Mutual Protection Life Insurance Co., of New York, in which the Widows' and Orphans' Benefit reinsured its risks, has changed its name to The Reserve Mutual Life Ins. Co.

THE Amicable Mutual Life Ins. Co., of New York, and the New York State Life Ins. Co., of Syracuse, have reinsured their risks in the Guardian Mutual Life Ins. Co.

WM. T. HOOKER, President of the Germania Mutual Life Ins. Co., died on the 5th of February, of pneumonia, after an illness of only four days.

EVERETT CLAPP, Esq., has been elected President of the Guardian Mutual Life Ins. Co.

AN Illinois woman sues for divorce because her lord's "husbandry proved imperfect."

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No. 7

DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1871.

From certified transcripts in our possession.

APPEAL.

§ 118. MARINE.—*Statute.*—*Held*, that under chapter 521 of the laws of Florida, an appeal lies to the supreme court from an order of the circuit court refusing to set aside a verdict and grant a new trial, and that the provisions of the code do not destroy the right of such appeal, but simply regulate the practice in its exercise.

*Schultz vs. The Pacific Ins. Co.**

Rep'd Jour'l p. 495.

FLA. S. C.

APPLICATION.

§ 119. LIFE.—*Answers in.*—The assured was asked the following question in the declaration: "Has any company declined to insure the party, if so, what company, when and

* Decision rendered January 23d, 1872. To appear in 14 Fla.

for what reason?" *Held*, that whether certain facts connected with an application by the assured to another company for insurance amounted to his application being declined or not, is a question for the jury to pass upon, and that unless his application was in reality declined he was under no obligation to disclose such facts in answer to the above question.

The Mutual Benefit Life Ins. Co. vs. Wise. *

Rep'd Jour'l p. 430.

MD. C. A.

§ 120. FIRE.—*Survey—Breach of Condition Precedent.* The printed part of the policy provided that "The policy is made and accepted in reference to the survey on file at the office and the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for." The conditions referred to declared "that if any survey, place or description of the property herein insured is referred to in this policy, such survey, place or description shall be deemed and taken to be a warranty on the part of the assured." A survey and application was made several years before upon another application for insurance upon the same property, and was referred to in the policy as containing a description of the property to be insured. *Held*, that the provision "requiring a written application by the person seeking insurance, was introduced for the benefit of the defendant, and if the company issued a policy without requiring it, the contract would take effect as though no reference thereto had been made," and that "the party to a contract, who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture. The terms of the contract must be clear and explicit in his favor;" and that the survey referred to was no part of the contract between the parties.

Clinton vs. The Hope Ins. Co. †

Rep'd Jour'l, p. 436.

N. Y. C. A.

* Decision rendered April —, 1871. To appear in 34 Md.

† Decision rendered April 4th, 1871. To appear in 45 N. Y.

CONSTRUCTION.

§ 121. LIFE.—*Sickness*.—The attention of the assured had been directed in the declaration to certain diseases specifically enumerated, and he was asked whether he had had any of these diseases. He was then asked whether he had had any sickness within ten years, and if so, what. He answered, "Pneumonia in 1862." In 1860 and 1861 he had chronic Pharyngitis, a disease not specified in the questions asked. *Held*, that it was for the jury to decide whether chronic Pharyngitis was a "sickness" in contemplation of the parties in putting and answering the questions.

The Mutual Benefit Life Ins. Co. vs. Wise.

—§ 119.

§ 122. FIRE.—*Policy*—"Estate of Daniel Ross"—*Interest of Administratrix*.—The administratrix applied to the agent of the company for a policy, and informed him that the insurance was desired for the benefit of the widow and heirs of Daniel Ross. A policy was issued by which the company undertook to insure "the estate of Daniel Ross" against loss or damage by fire upon property described as a cotton mill building and the fixed and movable machinery therein. The person or persons to be insured were not mentioned in the policy. The personal estate of the intestate was more than sufficient to pay his debts. *Held*, that "if the name of the person for whose benefit the insurance is obtained, does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is unspecified or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract, and when thus ascertained it will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it, who were in the minds of the parties when the contract was made."

1 Phil. on Ins. 163; *Colpoys vs. Colpoys*, Jacob, 451; *Burrows vs. Turner*, 24 Wend. 277; *Davis vs. Boardman*, 12 Mass. 30; *Newson's Administrator vs. Douglas*, 7 H. & J. 417.

And that "the words used in this policy were intended to designate the persons holding the legal title, and to speak of the property left by a deceased person, including the real property, especially before final settlement of his affairs, as his estate, if not accurate is not an unusual designation. We are of opinion that the interests, both of the administratrix and of the heirs in the insured property, were covered by this policy."

1 Phil. on Ins., 106; *Higginson vs. Dale*, 12 Mass. 96.

Clinton vs. Hooper Ins. Co.

— § 120.

§ 123. LIFE.—*Dying Condition at Expiration of Policy.* The assured, about two hours before the expiration of a policy upon his life, was so fatally stricken with paralysis, that he at once became and remained in a dying condition until the next day, when he died. It was claimed that within the meaning of the policy, he was dead before it expired. *Held*, that "it is not enough that his life was in such peril that no hope was left of a partial recovery, and that so far as his continued existence could have benefited the plaintiff or her children, by any provision he could have made for their comfort, his life to them may, in that respect, have been worthless. It was not against his ill health, or against any attack of apoplexy and paralysis, or fatal epidemic she was insured, but against his death from any cause, other than those excepted in the policy."

*Howell vs. The Knickerbocker Life Ins. Co.**

Rep'd p. 443.

N. Y. Com. A.

EVIDENCE.

§ 124. MARINE.—*Rule of, in Civil and Criminal Cases.* The judge in the court below charged the jury as follows: "If you find from the evidence that the master of the Mutter Schultz designedly cast away and destroyed his vessel, you must, of course, find for the defendant. In determining this question, you must be satisfied beyond a reasonable doubt that the master did designedly cast the vessel away, before you can find against him on this point." *Held*, that "the rules of evidence are the same in civil and

* Decision rendered May 1st, 1871. To appear in 44 N. Y.

criminal cases"; and that the rule is, "that the character of the fact to be proved, and not the position of the party, determines the degree of proof to be required. There was no error in this direction of the court."

Green. Ev., 10 ed., 65; Abbott, J., in 2 Starkie, 116; 2 Russell on Crimes, 589; Thurtell vs. Beaumont, 1 Bing., 339.

Schultz vs. The Pacific Ins. Co.

—§ 118.

§ 125. FIRE.—*Ownership*.—The Court instructed the jury that "the policies of insurance, with the applications described in the petition in this action are *prima facie* evidence of title, and of an insurable interest therein, in the plaintiff." *Held*, that "this was a correct ruling on this point. Possession and acts of ownership are always *prima facie* evidence of ownership of property."

Nichols et al. vs. Fayette Mutual Fire Ins. Co., 1 Allen 63; Fowler vs. New York Indemnity Ins. Co. 23 Barb. 150.

The Kansas Ins. Co. vs. Berry.*

Rep'd Jour'l, p. 455.

KAS. S. C.

§ 126. MARINE.—*Experts*.—*Held*, that "the questions of seaworthiness and care in the navigation of this ship just disposed of, are, in the language of Mr. Justice Story, questions of fact dependent upon nautical testimony, and are incapable of being solved by a court without assuming to itself the province of a jury, and judicially relying upon its own skill in maritime affairs."

McLanahan vs. The Universal Ins. Co., 1 Peters, 184.

Schultz vs. The Pacific Ins. Co.

—§ 118.

INSURABLE INTEREST.

§ 127. MARINE.—*Advances on Freight*.—A valued policy was issued upon the freight. At the time the contract of insurance was entered into a large part of the freight to be earned had been paid to the insured, so that the amount remaining due was less than that covered by the policy. By the terms of the charter-party and the indorsement on

* Decision rendered July 20th, 1871. To appear in 6 Kas.

the bill of lading, the moneys paid were advanced against the freight and were to be deducted therefrom. The verdict in the court below was for the full amount insured. *Held*, that the owner had "an insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it.

Schultz vs. The Pacific Ins. Co.

—§ 118.

JURY.

§ 128. MARINE.—*Verdict—When to be Set Aside.*—The verdict of the jury was founded on evidence complicated and contradictory, which required an investigation into the character and credit of the witnesses, whose testimony it was necessary to compare and weigh. *Held*, that this was the proper function of a jury.

1 Brevard, 150; 2 Sturges, 1142; 2 Burr., 665; 1 Wils., 22; 1 Burr., 396, 609; Cowp., 37; 2 Wils., 249; 3 Wils., 47.

Held, also, that "where there is conflict in the testimony, it is within the province and power of the court to set aside a verdict, which does not reach a substantially just conclusion, in cases where the conflicts are of such character and the circumstances of such nature as to give just ground for the belief that the jury acted through prejudice, passion, mistake, or any other cause, which should not properly control them."

Schultz vs. the Pacific Ins. Co.

—§ 118.

NEGLIGENCE.

§ 129. MARINE.—*Of Master.*—The defense was the negligence of the master, who was two-thirds owner. *Held*, that "a different rule of law is applicable to his negligence than would be applicable to negligence of the other officers or crew, which the master could not be expected to prevent with ordinary prudence and care." "The underwriter is not liable to indemnify the assured for losses by

the perils insured against, directly incurred through the frauds or gross misconduct of the assured."

Schultz vs. The Pacific Ins. Co.

—§ 118.

§ 130. MARINE.—The direct and proximate cause of the loss of the bark was stranding on the American Shoals during a gale, and in waters in which existed a current, the course and velocity of which varies. *Held*, that "this is a peril of the sea. The general rule, where barratry is excepted from the risks, which is this case, is, if the immediate cause of the loss is a peril insured against, it is no defense that the loss was remotely caused by gross negligence of the agent of the insured not amounting to barratry. This is the law as settled repeatedly by the Supreme Court of the United States, as well as of the King's Bench."

3 Pet., 222; 10 Pet., 507; 11 Pet., 213; 3 Sum., 276; 5 Barn. & Ald., 171.

Schultz vs. the Pacific Ins. Co.

—§ 118.

§ 131. MARINE.—*Held*, that "where the assured establishes a loss and shows that the direct and proximate cause of it is a peril insured against, then the insurer can relieve himself by showing that the efficient and direct cause of encountering the peril was the failure, on the part of the assured, to act in good faith toward the insurer or to exercise ordinary prudence in the management, navigation and care of the vessel."

Schultz vs. The Pacific Ins. Co.

—§ 118.

POLICY.

§ 132. LIFE.—*Jury—Questions for.*—It was agreed in the declaration and policy that the policy should be void if any untrue or fraudulent allegations should be contained in the answers of the assured to questions asked in the declaration. He was asked whether he had been or was then employed in military or naval service; whether

he had had any sickness within the last ten years, and if so, what; and whether any company had declined to insure him, and if so, for what reason. *Held*, that "these answers were not warranties but representations made material by the agreement of the parties, and that therefore their truth alone, and not their materiality, was open to the consideration of the jury," and that "it was not incumbent upon the insurer to show that the answers were morally false, but that if they were shown to be simply untrue it would be sufficient to defeat the plaintiff's action."

Anderson vs. Fitzgerald, 4 House of Lords, Cases 503—514; *Campbell vs. New England Ins. Co.*, 98 Mass. 381.

The Mutual Benefit Life Ins. Co. vs. Wise.

—§ 119.

PRACTICE.

§ 133. LIFE.—*Removal to Federal Courts.*—*Held*, that where the plaintiff was a citizen of Virginia at the time of the institution of the suit, the provisions of the Act of Congress authorizing removal from the State to the Federal court do not apply.

The Mutual Benefit Life Ins. Co. vs. Wise.

—§ 119.

§ 134. LIFE.—*Jury—Questions for.*—The following question was asked in the declaration: "Has the party been, or is he now employed in any military or naval service?" *Held*, that it was a question for the jury to decide whether a chaplain in the army is in the military service, and whether the assured, if in the military service, was ever actually employed in such service.

The Mutual Benefit Life Ins. Co. vs. Wise.

—§ 119.

PREMIUM.

§ 135. LIFE.—*Non-payment of.*—The policy contained the clause "and it is hereby agreed that this policy may be continued in force from time to time until the decease of

the said George R. Howell, provided that the said assured shall duly pay or cause to be paid to the said company annually, on or before the 15th day of July in each and every year, the sum of one hundred and thirty-eight dollars and fifty cents. On the 15th day of July, 1862, Howell went to his place of business prepared and intending to pay the said annual premium; but before he did so he was stricken down with paralysis, and died the next day, without having made the payment." *Held*, that "the payment of the premium was an act, which could have been performed by any other person than the plaintiff's husband; its payment did not necessarily depend upon his continued capacity or existence; and hence, although he was, shortly prior to the expiration of the policy, when about to pay the premium, rendered incapable, by the act of God, she is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power."

Brown's Leg. Max. 6th Am. ed., 178, 179, and cases there cited.

Howell vs. The Knickerbocker Life Ins. Co.

—§ 123

§ 136. LIFE.—*Waiver—Agents.*—The general agents of the company prepared and sent the application of the assured to the home office, and received a policy in return duly executed, which they inclosed, with two notes for the credit portion of the premium, to the assured, saying, in their letter, "the cash payments we will get of Scott when the proper time arrives." The assured signed and returned the notes to the agents. The policy recites that the plaintiff paid the company the cash part of the premium in hand. Scott afterward refused to pay the cash part of the premium, and the agents wrote to the assured, requesting him to make the payment, telling him it had been so long delayed that they would have to add interest. *Held*, that the facts in the case are sufficient to support the judgment of the Circuit Court for the plaintiff, and that beyond all doubt they show a waiver; and *Held*, that the general

agents had the power to deliver the policy without first exacting the payment of the cash premium.

Boehen vs. Ins. Co. 35, N. Y. 131.

Brooklyn Life Ins. Co. vs. Miller.

—§ 116.

§ 137. LIFE.—*Extending Payment of.*—At the time of paying the annual premium on a policy previously issued, the following agreement was entered into: "And it is hereby agreed that this policy may be continued in force, from time to time, until the decease of the said George R. Howell, provided that the said assured shall duly pay, or cause to be paid to the said company, annually, on or before the 15th day of July, in each and every year, the sum of one hundred and thirty-eight dollars and fifty cents." On the 15th day of July, 1862, Howell went to his place of business prepared and intending to pay the said annual premium; but before he did so he was stricken down with paralysis, and died the next day, without having made the payment." At the trial the defendant admitted that it was understood and agreed by and between the defendant and the said George R. Howell, after the policy was issued, and when the annual premium was paid, that if anything should happen to him to prevent his paying such premium on the day whereon the same became payable, the said policy should not thereby become null and void, but should continue in full force for a reasonable time thereafter, so that the said premium could be paid." *Held*, that the agreement, being made after the insurance was effected and the policy delivered, was binding upon the parties, and that the policy was continued in force.

The Trustees of the First Baptist Church *vs.* Brooklyn Fire Ins. Co., 19 N. Y., 305, 307.

Howell vs. The Knickerbocker Life Ins. Co.

—§ 123.

PROOF OF LOSS.

§ 138. FIRE.—*Affidavit—Insanity.*—In his affidavit, the insured, after giving the particulars of the loss, proceeded further to state that he believed the building had been set

on fire by an incendiary; that he had heard of repeated threats of a person, whom he named, that he would burn the premises; and that it was in consequence of these threats that he had procured the insurance. Testimony was given on trial to show that at the time of making this affidavit the insured was insane. Defendants asked instructions to the effect that "they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given." *Held*, that "if he was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy;" and that if the affidavit, which is sufficient in the information it conveys of the time, the nature, and amount of the loss, "contains something more which was the result of insanity, that does not vitiate what is well and truly stated in the affidavit."

Germania Fire Ins. Co et al. vs. Boykin.

—§ 112.

REPRESENTATION.

§ 139. MARINE.—*Concealment—Warranty.*—"It was alleged that there was concealment, in reference to the condition of the ship, at the time the policy was applied for." *Held*, that "this a matter to which the implied warranty of seaworthiness extends, and the assured is not obliged to communicate any fact as to which there is a warranty expressed or implied, unless information upon the subject is particularly called for in the first instance."

20 John, 214; 4 East, 590; Annesly on Ins., 143; 12 Md., 343.

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—§ 118.

SEAWORTHINESS.

§ 140. MARINE.—*Held*, that it is a compliance with the warranty of seaworthiness "if the ship is in a suitable condition to carry the cargo put on board, or intended to be so, it being sufficient if the vessel is fit for the service in which she is employed."

1 Phillips on Ins., 114.

Schultz vs. the Pacific Ins. Co.

—§ 118.

SUBROGATION.

§ 141. FIRE.—*Right of Vendors.*—The vendee took possession of the property insured, a mill and the machinery therein, and held it until after the fire, paying \$1500 down, under a contract for the sale of the property for a certain sum, which contract gave him immediate possession, and declared that he should hold the land and personal property as tenant of the estate at a fixed rent until the deed should be executed and delivered. *Held* that “the title to the personal property did not pass by the contract. By the agreement of the parties, the vendor at the time of the fire held it as tenant. When it was destroyed by the fire it was the property of the vendors in the contract, and the loss was theirs.”

Herring vs. Hoppick, 15 N. Y. 409; *Hasbronck vs. Lounsberry*, 26 N. Y. 599.

“They were disabled to perform the contract in respect to the personal property, nor could they, under the circumstances, compel the vendee to accept a partial performance on their part, and require him to take land.”

Bacon vs. Simpson, 3 Mic. and U. 78.

“The same event, therefore, which fixed the liability of the defendant to pay the insurance, discharged the vendee from the obligation to pay the debt, to which the defendant claims to be subrogated. Manifestly there was then no right of subrogation.”

Clinton vs. The Hope Ins. Co.

—§ 120.

UNDUE INFLUENCE.

§ 142. FIRE.—*By Adjuster.*—The adjuster of the company, by disputing the right of the insured to recover of the company on account of his having left his premises vacant, and his right to include various articles of furniture, books and stationery, in his claim, and the amount of damages, influenced him to make a compromise for a much less sum than the real amount of his loss, but without persuasion. *Held*, that the adjuster was the agent of an adverse interest, and that “presumptively he would not

be likely to stand in any different position from other persons, dealing at arm's length," and that "the law cannot interfere to supply a lack of firmness in those, who allow themselves to yield to such influences, without some further elements of misconduct." The compromise of itself is no ground of relief.

*Mayhew vs. The Phoenix Ins. Co.**

Rep'd Jour'l p. 450

Mich. S. C.

UNSEAWORTHINESS.

§ 143. MARINE.—*Presumption of—Jettison.—Held*, that a necessary jettison, shortly after sailing with a proper load, is a fact tending to generate a presumption of unseaworthiness, and that the burden of proof is upon the defendant. He must prove the necessity of the jettison.

Schultz vs. the Pacific Ins. Co.

—§ 118.

§ 144. MARINE.—*Presumption of.—Held*, that "where the proximate cause of a leak, discovered shortly after sailing, and which results in a loss of the ship, or renders her incapable of proceeding on her voyage, cannot be traced to a peril insured against or ascribed to stress of weather or some accident on the voyage, then a presumption of unseaworthiness, when the vessel sailed, should be generated in the minds of the jury, and unless that natural presumption is overcome by the assured, the insurer should be discharged. In order to create this presumption the burden of proof of all these facts lies upon the insured, for in the absence of testimony the ship is presumed to be seaworthy."

Schultz vs. The Pacific Ins. Co.

—§ 118.

VERDICT.

§ 145. MARINE.—*When to be Set Aside.*—The jury in the court below gave credit to the mate corroborated by the boatswain, rather than to two witnesses, who had sworn falsely with reference to the incidents of this identical voyage, and to one, whose statements bore internal evi-

* Decision rendered April Term, 1871. To appear in 22 Mich.

dence of incorrectness in several particulars, and the court refused to set aside their verdict. *Held*, that the case does not require this court to set aside the action of both court and jury.

Schultz vs. The Pacific Ins. Co.

—§ 118.

§ 146. MARINE.—*When to be Set Aside.*—*Held*, that in all cases of appeal, where the judge has declined to disturb the verdict of the jury, the presumption is that he exercised his discretion properly and that “a very clear and strong case must be made out before this court would feel justified in reversing his action. It should be a very plain case to justify an appellate court in setting aside this concurrent conclusion of both court and jury, upon the ground that their action was contrary to the evidence or weight of evidence.”

Schultz vs. The Pacific Ins. Co.

—§ 118.

§ 147. MARINE.—The verdict of the jury was in these words: “We, the jury, find for the plaintiff, and assess the damages at six thousand dollars, with interest from the commencement of this suit at legal rate.” *Held*, that there is no doubt as to the intention of the jury, and that “their conclusion is expressed with sufficient certainty to justify a judgment thereon.”

Schultz vs. The Pacific Ins. Co.

—§ 118.

WARRANTY OF SEAWORTHINESS.

§ 148. MARINE.—*Negligence—Burden of Proof.*—*Held*, that “the implied warranty of seaworthiness requires at the hands of the assured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract. There is no doubt that the burden of proof is here upon the underwriter. This negligence must appear from the plaintiff’s case, or defendant must prove it. The presumption is with the assured after proof of loss.”

4 Mason, 441; 12 Wheat., 383; 4 T. R. 37; 4 Camp., 234; 1 Burr. 347.

Schultz vs. The Pacific Ins. Co.

—§ 118.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified Transcripts in our possession.

SUPREME COURT OF FLORIDA,

JANUARY TERM, 1872.

Appeal from Circuit Court for Escambia County.

HENRY SHULTZ, *Resp't.* }
vs. }
THE PACIFIC INS. CO., *App't.** }

Under chapter 521, of the laws of Florida, an appeal lies to the Supreme Court, from an order of the Circuit Court, refusing to set aside a verdict and grant a new trial.

The provisions of the code do not destroy the right of such an appeal.

It is the function of a jury to compare and weigh the character and credit of witnesses whose testimony is complicated and contradictory.

It is within the province and power of the court to set aside a verdict, which does not reach a substantially just conclusion, when there is just ground for the belief that the jury acted through prejudice, passion, mistake, or any other cause, which should not properly control them.

Where the judge has declined to disturb the verdict of the jury, the presumption is that he exercised his discretion properly.

It should be a very plain case to justify an appellate court in setting aside the concurrent conclusion of both court and jury, on the ground that their action was contrary to the evidence, or weight of evidence.

Where the court below gave credit to one witness, corroborated by another, rather than to two witnesses, who had sworn falsely to the incidents of the identical voyage, and to one, whose statements bore internal evidence of incorrectness, and refused to set aside the verdict of the jury, the case does not require this court to set aside the action of both court and jury.

Where the proximate cause of a leak, discovered shortly after sailing, which resulted in the loss of the ship, cannot be traced to a peril insured against, or to stress of weather, or to some accident upon the voyage; a presumption of unseaworthiness, when the vessel sailed, should be generated in the minds of the jury, and the insurer should be discharged, unless this presumption is overcome by the insured.

*Decision rendered January 23d, 1872.

In order to create this presumption the burden of proof of these facts lies upon the insured.

It is a compliance with the warranty of seaworthiness, if the ship is in a suitable condition to carry the cargo put on board, or intended to be put on board.

A necessary jettison, shortly after sailing with a proper load, is a fact tending to generate a presumption of unseaworthiness.

The burden is upon the defendant to prove the necessity of the jettison.

It is a general rule, where barratry is excepted from the risks, that if the immediate cause of the loss is a peril insured against, it is no defense that the loss was remotely caused by the gross negligence of the agent of the insured not amounting to barratry.

The underwriter is not liable to indemnify the insured for losses by the peril insured against, directly incurred through the frauds or gross misconduct of the insured.

The insurer can relieve himself by showing that the efficient and direct cause of encountering the peril was the failure on the part of the insured to act in good faith to" and the insurer, or to exercise ordinary prudence in the management, navigation, and care of the vessel.

The implied warranty of seaworthiness requires from the insured such a degree of care in the selection of his officers and crew, as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract.

The burden of proof is here upon the underwriter. The presumption is with the insured after proof of loss.

The questions of seaworthiness and care in the navigation of the ship are questions of fact, dependent upon nautical testimony.

The owner has an insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it.

The insured is not obliged to communicate any fact, as to which there is a warranty, express or implied, unless information upon the subject is particularly called for in the first instance.

In determining whether the master designedly cast away and destroyed his vessel, the jury must be satisfied beyond a reasonable doubt that he did so, before they can find against him.

The rules of evidence are the same in civil and criminal cases. The character of the fact to be proved, and not the position of the party, determines the degree of proof to be required.

The verdict that "We the jury find for the plaintiff, and assess the damage at six thousand dollars with interest from the commencement of this suit at legal rate," expresses the conclusion of the jury with sufficient certainty to justify a judgment thereon.

The only thing which gives verity to the correction and settlement of a case, in this court, is the signature of the judge. The want of this is a fatal defect.

MALLOY & MAXWELL, for *Appellant*.

C. W. JONES, for *Respondent*.

WESTCOTT, J.

The case presented by this record with the exception of some objections to the law, as given to the jury by the court, and another to a matter arising upon the record, is a motion for a new trial based upon a consideration of the entire evidence in the case.

The position is taken that an appeal does not lie from an order of the circuit court, refusing to set aside a verdict and grant a new trial, and that the exercise of such discretion cannot be here reviewed. It is insisted that granting a new trial is a matter within the discretion of the circuit court, not of right in the party, and

for that reason is not an intermediate order involving the merits and necessarily affecting the right of the party within the meaning of subdivision one, of section ten, of the code.

In disposing of this question, we deem it unnecessary to determine whether such an order is of the character mentioned in subdivision one, in view of our conclusion that even if it is not such an order, yet the right of the party to have such an order reviewed is given by the first section of chapter 521 of the laws, and the effect of the provisions of the code is not to destroy that right but simply to regulate the practice in its exercise. We reach this conclusion by a consideration of all of the statutes having reference to the subject matter. We give them a consistent construction, and one which we conceive carries out the intention of the Legislature in enacting the code.

Upon an appeal from a final judgment, the act of 1853, chapter 521, gives the party the right to have such exercise of discretion by the circuit court reviewed by this court. The last clause of section 210 of the code prescribes the method by which the decision of the court upon a motion for a new trial is to be brought to this court upon an appeal. The code therefore in its letter recognizes the existence of such right. The repealing clause of the code repeals only such statutory provisions as are inconsistent with it, and secures all rights of action given or secured by existing laws. The intention of the Legislature in the enactment of the code was to abolish the distinction between legal and equitable remedies and to have uniform proceedings in all cases. It was to regulate the practice but not to destroy the right. It was the right of the party anterior to the code to have such an order reviewed, and the effect of that section of the code authorizing appeals in certain cases is not to destroy a right to appeal in other cases, or to limit the operation of an appeal to the cases enumerated in that section. A statute regulating the practice and to some extent the appellate jurisdiction of the court, which itself prescribes the practice in the matter of appeals authorized by antecedent laws, should not be held to repeal those laws, where the general purpose of the statute is not to destroy the right but simply to regulate the practice in such cases.

In this case there has been one trial by the court, which resulted favorably to the defendant; one mistrial by a jury, and this the third trial by a jury, resulting favorably to the plaintiff.

The mistrial should not benefit either party and the finding of the court for the defendant upon the facts, followed by a finding for

the plaintiff by the jury upon the facts, enables us to consider the case as if it was the first trial; neither party we think can claim any advantages by these proceedings.

The verdict of the jury here is founded on the evidence of facts, complicated and contradictory, which required an investigation into the character and credit of the witnesses, whose testimony it was necessary to compare and weigh. To do this is the proper function of a jury. 1 Brevard, 150; 2 Stranges, 1142; 2 Burr, 665; 1 Wils. 22; 1 Burr, 396, 609; Cowp., 37; 2 Wils. 249; 3 Wils. 47.

While it is true that this is the proper function and province of the jury, it is at the same time true that in cases, where there is conflict in the testimony, it is within the province and power of the court to set aside a verdict, which does not reach a substantially just conclusion in cases where the conflicts are of such character and the circumstances of such nature as to give just ground for the belief that the jury acted through prejudice, passion, mistake or any other cause which should not properly control them. This power exists in the court. In exercising it the court does not encroach upon the province of the jury for the reason that it does not conclusively settle facts in the form of a verdict but only gives another jury the opportunity of so doing, and of correcting what appears to be a mistake. If this is not properly within the power of the court, then the result is that the first twelve men that happen to constitute a jury in a given case are by law the final arbiters of the facts in that case. There is no such principle of law.

This is a conservative and justly prized power of the court; like all powers it may be abused. It is much better however that exceptional cases of its improper exercise should be endured than that the security, which it affords, should be withdrawn. The rule which should govern a court in the exercise of this power should be a fair view of the justice of the particular case, the character of the conflicting testimony, and the surrounding circumstances rather than an extraordinary degree of respect for the maxim *ad questionem facti non respondent iudices ad questionem legis non respondent juratores*—and wherever it appears to the court that there is difficulty in reconciling the verdict with the justice of the case, and the manifest weight of evidence, there the court should not, from a too great respect for this wise and venerable maxim, withhold its power. This is the rule, which should govern the judge of the court presiding at the trial, who has the same opportunity as the

jury to observe what occurs in the trial. In all cases of appeal the presumption is that he exercised this discretion properly, and the case is not presented to this court as it was to him, because this additional presumption is added to the verdict. Where he has declined to disturb the verdict of the jury, a very clear and strong case must be made out before this court would feel justified in reversing his action. It should be a very plain case, to justify an appellate court in setting aside this concurrent conclusion of both court and jury upon the ground that their action was contrary to the evidence or weight of evidence.

With this statement of the rule which should govern us in the consideration of cases involving conflicts in testimony, where a new trial has been refused, we proceed to apply it to such portions of this testimony as are contradictory, and to determine what is the condition of this case in that respect. There are manifest conflicts in the testimony of the mate, and that of Grant the cook, and the two seamen, Brown and Hitchings. The mate testifies that there were ten or fifteen hours of dark and cloudy weather on the 20th, during which the wind was blowing fresh, and there was a heavy sea, the ship laboring very heavy—that during like weather on the 21st the ship was found to be leaking, and that there was about six feet of water in the hold—that sixteen pieces of heavy timber were thrown overboard, and that the men were kept at the pumps, at one time three hours or during their watch half the crew; that the bark became free of water on the morning of the 23d after which, and up to the time of her loss, she made about eight or ten inches of water in twenty-four hours.

Grant, the cook, testifies that the depth of water in the bark was seven feet on the morning of the 21st. In one place he says that after the pumps were first tried, the men were kept constantly at the pumps night and day. In another place he says that after throwing over a portion of the deck load, the pumps sucked, that there was an intermission of twelve hours, when the water had gained five or six inches. He says, also, that the water got to be eight feet, and that the weather was fine, and the wind fair, up to four o'clock on the 26th. Brown, one of the seamen, testifies that upon trying the pumps first, there was two feet water in the pump well; that on the second day out, the 21st, there was three feet of water in the pump well. In one place he says that this was preceded by a squall and rain, and in another that from the time he left Pensacola to the afternoon of the 25th, the weather "was variable and light, with rain;" that the bark required to be pumped

every fifteen minutes; that it took three-fourths of an hour spells to free her after standing fifteen minutes; that the bark was at times during the voyage free from water, when all the ship's company was employed and the weather was light; that after sucking the pumps in about ten minutes there would be sixteen inches of water in the pump well, and it would take four men three-fourths of an hour to suck the pumps after standing ten minutes; that the bark had to be pumped about every hour in the twenty-four, and that when the crew kept steady at the pumps and the wind was light, and the sea smooth they would suck about two or three times in twenty-four hours, and that she was not seaworthy.

Hitchings, one of the seamen, testifies that when twenty-four hours out the bark sprung a leak. In one place he states five feet of water was found in the pump well at this time, in another that six feet was found; that after this, and up to the time she got ashore, the pump well averaged eight feet; that on the third day out the master called the crew, himself among the number, aft, and asked what was best to do, when he replied that they ought to return for repairs; that the captain said, we will throw the deck load overboard, and the crew must not be alarmed, as he was going to hug the land, and that on Friday, the sixth day out, half of the deck load was thrown overboard. This witness makes six feet water in the pump well on Monday at eight or ten o'clock. This is inconsistent with the testimony of every other witness. He also has the jettison of the timber to occur when six days out, when it happened on the third day out. He makes an average of eight feet water in the hold, when the testimony of Grant and Brown is that the men were constantly at the pumps. If what they say is true, there could be no such average. In this conflict the jury believed the mate and disbelieved the seamen, and we think the reason for their so doing is found in the record.

The witnesses, Grant and Brown, on the 30th of December, 1869, when all of the facts connected with this matter must have been fresh in their minds, joined in the protest of the Captain and then swore "that on the 21st day of December, the bark suddenly made more water than usual, and at one time during that day had five feet of water in her, that the leak was supposed to be somewhere in her topsides, and therefore sixteen pieces of heavy timber were thrown over from deck, after which the bark was freed from water, the leak ceased, and the ship was dry; that when they left Pensacola the bark was tight, staunch, and strong," that the loss was

owing immediately to adverse winds, heavy, squally, and foggy weather, and a strong, adverse current, which sometimes sets in across the Florida reefs from the gulf stream, and was not the result of neglect or failure to perform their duty by either officers or crew.

It would certainly be improper either for this or the circuit court to set aside a verdict of a jury by giving credence to any thing sworn to by persons thus plainly guilty of false swearing. What they swear to in this protest, and what they swear to in this trial, is entirely inconsistent, and for this reason the jury was entirely justified in giving no weight to their testimony in any particular. This leaves the conflict in the testimony to the statements of the mate and the seaman Hitchings. The only inconsistency we can discover in the testimony of the mate, is in respect to the weather on the night of the 26th, and about that there is sufficient other testimony to have enabled the jury to form a conclusion. In respect to the testimony of Hitchings, an examination of it will disclose that he makes six feet of water in the pump well on Monday at eight or ten o'clock, which is inconsistent with the testimony of every other witness. He has the jettison of the timber to occur when six days out; it happened on the third. He makes an average of eight feet water in the hold during the voyage, when, if what Grant and Brown say, that the men were constantly at the pumps, etc., is true, there could not have been such an average.

Upon most material questions the testimony of the mate is corroborated by the affidavit of James Davis, the boatswain, who joined in the protest of the Captain. This is a circumstance which the jury had a right to consider.

It was necessary in this case to compare and weigh the testimony of these witnesses. The circuit court could not say, under these circumstances, that the jury erred in giving credit to the mate thus corroborated by the boatswain, rather than to two witnesses, who had sworn falsely with reference to the incidents of this identical voyage, and to one, whose statements bore internal evidence of incorrectness in several particulars. Even if the testimony of one witness had been entirely consistent, we cannot see that such a case would be presented as would have required the court below to discredit the action of the jury in believing the mate rather than him, and certainly no case is presented here requiring us to set aside the action of both court and jury.

What we determine in this case is this precise proposition. Where there is a conflict between one witness for the plaintiff and

three for the defendant, and the record discloses that two of the witnesses for the defendant had sworn falsely in the precise matter being investigated, and that many of the circumstances which appeared to be true were inconsistent with material facts to which the third swore, and the testimony of the one witness for the plaintiff is unimpeached in any essential particular, and is corroborated by the affidavit of another person, the court should not grant a new trial in case of a verdict for the plaintiff, unless the case presented by the testimony of the one witness for the plaintiff and the other testimony entitled to consideration is such as authorizes such action.

This, therefore, is the inquiry, which disposes of the matter of a new trial, so far as it involves a consideration of the facts of the case.

The first point made by the defendant which we consider is, that in an insurance upon the freight the vessel must be seaworthy for the destined voyage when she sailed, that the evidence discloses that such was not the case, that it is established that this vessel, shortly after sailing, and without encountering any stress of weather, accident or any peril insured against, was found in a condition from which a presumption arises that she was unseaworthy for the voyage when she sailed, that this presumption is not rebutted by the plaintiff, and that for this reason the verdict should have been for the defendant.

In what condition was this ship at the time referred to, and what was the cause of such condition, is, therefore, the first question which arises upon the testimony. The testimony of the mate, so far as it discloses these facts, must make the case to be considered. According to his testimony the bark left Pensacola on the morning of the 19th of December; she did not leak before she crossed the bar; she crossed the bar at eight o'clock. The weather continued fair until next day, the 20th. The bark commenced to leak on the 21st in the morning. On the morning of the 21st he sounded the pumps, and found about six feet water in her hold. On the 21st the wind was blowing fresh, weather dark and cloudy, the vessel laboring very heavy; cannot give the exact time the weather described continued—it was between ten and fifteen hours—this was on the 20th. The weather was stated in the log. On the morning of the 21st the crew were called aft by the Captain. He stated the condition of the vessel, and their answer was that they looked to the Captain as their father, and expected he would do the best for all concerned. The men were kept at the pumps at one time three hours, or during their watch, half of the crew

A part of the deck load, sixteen pieces of heavy timber, was thrown overboard. She became free of water on the 23d in the morning. After the 23d, and up to the time of the loss, she made about eight or ten inches water in twenty-four hours. This witness says nothing as to the character of the weather on the 22d, 23d, and 24th. On the 25th he says there was a fresh breeze. At 12 M. on the 26th he says the weather was fair. At four o'clock there was no breeze, and had no steerage way on the bark from four to six. The weather continued calm until near six o'clock. From six to eight I was below, but the weather was rainy and squally. The weather from eight until she went ashore was rainy and stormy. About ten o'clock the sea was running high, the squalls came on often; they were very heavy, sometimes had to lower the tops down and clew everything up. The night was dark, the sea at the time we went aground was very heavy.

Henry Files, of Key West, examined for plaintiff, says he has been on board the bark since she was wrecked, her top works were staunch, strong and solid. Her bottom was out. In speaking of the weather on the night of the 26th, he says it was a heavy gale of wind; a heavy, dark night, raining heavily; wind variable and squally.

James Peat, for defendant, says the wind on that night blew heavily in squalls.

Courtland P. Williams, for defendant, says: when the bark ran ashore the wind was very fresh and squally, a heavy sea heaving in. In the squalls it blew very heavy.

Graham J. Lister, for defendant, says: the wind, on the night of the 26th December, was blowing heavy, with violent squalls, a heavy sea, and the night very dark.

F. Files says the weather was stormy, and wrecking vessels were out.

Considerable repairs were made on the ship while in port; and the artizans employed in Pensacola in making these repairs on the bark swear that, in their opinion, she was seaworthy for the voyage; that her timbers, so far as they examined them, and to the extent they saw them, were strong and solid. They say, however, upon cross examination, that they made no examination below the water line. An expert swears that he has noticed the drainage from sticks of timber such as were put on the bark, and that he has seen seven feet of water in vessels the size of the Schultz, which had slashed into the bow port and from drainage; and that the timber, with which the bark appeared to be loaded, appeared to have been in the water some time.

This, we think, is substantially the testimony in this record, which relates to the subject of seaworthiness, embracing her appearance in port, and extending from the day the bark sailed to the night of her loss. It does not include any statement of Brown and Grant.

Do these facts make such a clear case of unseaworthiness that we should reverse the action of the judge of the Court below, in refusing to set aside a verdict of the jury finding the contrary? We have before stated the rule which we think should have controlled the exercise of his discretion in this respect, and the presumption is that he exercised his discretion properly.

The question of seaworthiness is one of fact, the consideration of which is peculiarly within the province of the jury. The effect of a want of it upon a contract of insurance is one of law. Therefore, in stating what we think is a rule, of natural presumption as to the fact of seaworthiness, and a rule which should govern a jury in reaching a conclusion upon the subject, we do not wish to be understood as stating a rule of law, except in so far as the law enforces all natural presumptions, and authorizes a Court to set aside verdicts contrary to them. The fact here, from which a presumption of unseaworthiness at the time the bark sailed was sought to be generated in the minds of the jury, was the leaky condition of the ship about fifty hours after the vessel sailed. The condition was occasioned by a leak. The simple springing a leak in ordinary weather, shortly after sailing, independent of its effects and character, should not create a presumption of unseaworthiness when the ship sailed. In all cases, however, where the proximate cause of a leak discovered shortly after sailing, and which results in a loss of the ship, or renders her incapable of proceeding on her voyage, cannot be traced to a peril insured against, or ascribed to stress of weather or some accident on the voyage, then a presumption of unseaworthiness, when the vessel sailed, should be generated in the minds of the jury, and unless that natural presumption is overcome by the assured, the insurer should be discharged. In order to create this presumption, the burden of proof of all these facts lies upon the insurer, for in the absence of testimony the ship is presumed to be seaworthy.

We do not intend by thus stating what should be a natural presumption in a case where the leak resulted in a loss of the ship, or made it necessary for her to discontinue the voyage, to say that it is not possible for the evidence to disclose such a state and condition of the ship shortly after sailing, as would justify and require the jury to conclude that there was unseaworthiness when she

sailed, although the condition thus disclosed was not the proximate cause either of a loss of the ship or of her failure to make the intended voyage. The question is as to the fact: Does the evidence disclose such facts as establish the conclusion that the vessel when she sailed was not in a condition to encounter the ordinary dangers of the voyage, the dangers not insured against. The bark not having been prevented from pursuing her voyage, and not having been lost through this leak, as the proximate cause of the disaster, those cases, which decide that from such circumstances a presumption of unseaworthiness arises, are not strictly applicable to this case. It may be admitted that the effect of such facts is as defendant contends, and it does not affect this case. The question here is: What is the effect of the facts which the jury had a right to infer, or which the testimony tended to prove?

Viewed in this light, what was the character of the leak in this case? We have no subsequent examination disclosing its locality in the ship. We do not know the exact time that it commenced. The bark did not leak before she crossed the bar; she crossed the bar about nine o'clock Sunday morning, and the leak was not discovered until Tuesday morning. We do not know the proportion in which the volume of water going into the ship increased or decreased during this period. When the leak was discovered there was six feet water in the vessel; she could have been taking in this water from Sunday at eight or nine o'clock until Tuesday morning, say forty hours; during this time the leakage, which some experts declare often happens in the best of vessels at the commencement of the voyage, and that which was incident to the drainage of the cargo—timber saturated with water—happened. In addition to this, and before the leak is discovered, the vessel encounters fifteen hours of weather, described by one witness as weather during which the wind was blowing fresh, the weather dark and cloudy, with a heavy sea, causing the vessel to labor very heavily; and by another—and a witness for the defendant—as a squall and wind. When the leak is discovered, the men are called to the pumps; at one time, on Tuesday, they are kept at the pumps three hours, or during their watch. In addition to this, sixteen pieces of heavy timber are thrown overboard. On the next day she becomes free of water, and up to the time of her loss, five days thereafter, she made about eight or ten inches water in twenty-four hours. During a portion of the last twenty-four hours of the voyage she encountered weather described by one witness for the plaintiff as a heavy gale of wind, by one of defendant's witnesses,

as "squally weather, blowing heavily in the squalls"; by another, as "fresh and squally, a heavy sea heaving in, the wind about a reefed topsail breeze for a ship going to windward, in the squalls blowing very heavily." In addition to the use of the pumps, the evidence discloses that sixteen pieces of heavy timber were thrown overboard on Tuesday, the 21st. This may be thought to be evidence of an overloading of the ship, by which we mean a load beyond her tonnage or capacity; but here we are met by the direct and positive testimony of the stevedore, who supervised the loading, that she was not overloaded, and that in this respect everything was proper. Our attention in this connection has been called to the remark of Mr. Justice Radeliff, in *Abbott vs. Broome*, 1 Caines, 302, to the effect that "a vessel is not seaworthy unless she be in a condition to carry a full cargo." The question there was not a general question of seaworthiness, and the remark should be limited to the particular subject under consideration, "the question being whether the vessel was seaworthy for the purpose of carrying to New York a cargo brought from India. It is a compliance with this warranty if the ship is in a suitable condition to carry the cargo put on board or intended to be so, it being sufficient if the vessel is fit for the service in which she is employed." 1 Phillips on Ins. 114.

We have searched in vain to find a case of this character a serious leak remedied by the action of the pumps and by a jettison of a small portion of the cargo. We are clear that a leak, which is remedied by the action of the pumps, is not sufficient to rebut the ordinary presumption of seaworthiness in a case where all the direct and positive testimony is to the effect that the vessel was seaworthy. In this case repairs were made while in port; all the artisans employed on the ship testify that her timbers, to the extent of their examination, were sound and solid. It is true that no repairs were made below the water-line, and they are unable to speak as to the condition of her garboard streaks and like matters; but if, in a general examination of her upper works and of the timbers immediately connected with the repairs made, they find them firm and solid, the conclusion that those below the water-line were in like condition cannot be called an inference in no degree sanctioned by the testimony.

In addition to this is the testimony of one witness, who visited her after the wreck, to the effect that her upper works were sound and solid.

As to the matter of the jettison. A ship having on board nothing

more than a cargo corresponding to her capacity, should be able to encounter ordinary weather without a jettison of her cargo—certainly without a jettison of any considerable portion of it. Seaworthiness implies an ability and sufficiency to carry the intended cargo to the port of destination. If this is true where the insurance is as to the ship, it should unquestionably be true as to freight to be earned by carrying the cargo, which is this case. A necessary jettison shortly after sailing with a proper load is a fact tending to generate a presumption of unseaworthiness. What was the jettison here? It was sixteen pieces of heavy timber. The bill of lading shows the cargo to have consisted of 1208 pieces of timber. The term “heavy” is very indefinite, and the only facts disclosed by which any comparison can be made is the number of pieces thrown overboard and the number constituting the entire cargo. If it be considered that they were of the average weight, we have a jettison of less than one seventieth of the cargo; but there is not a particle of evidence by which we can estimate accurately the weight of the pieces jettisoned or of any of the other pieces, and we cannot say with any reasonable certainty what its weight was. Even if the weight was given, in the absence of testimony of an expert, any statement by the court as to its effect in elevating the topside of the ship, or its effect upon the leak, would be a judicial assumption of knowledge in matters of nautical science.

Was this a *necessary* jettison? for an unnecessary jettison can not be evidence of an incapacity to carry the cargo on board. We are unable to determine this question with such satisfaction and clearness as should exist to justify us in controlling the discretion of the court below in the matter of granting a new trial. The evidence is wanting in that certainty which would enable even an expert to form or express an opinion. Could he determine with any reasonable certainty that a jettison was necessary without having some definite idea as to the amount jettisoned in a case where the leak is remedied, not by the jettison alone, but by it and the combined action of the pumps. The capacity of the pumps, a definite knowledge of the history of the decrease of the leak, the weight of the cargo jettisoned, and many other matters, would constitute elements in the formation of any clear judgment upon this subject. These facts are not disclosed, and the burden of proof is upon the defendant as to all of them. He must prove the necessity of the jettison, or it must appear from plaintiff's evidence; here two of his witnesses are entitled to no relief at all, and the other does not detail the facts, and to the extent that he relates

facts, and his statement is in conflict with that of the mate, we can not say to the jury, under the circumstances, that they should have believed him rather than the mate. Here we have one effect produced by two causes, either cause being of a nature to produce the effect. In a case where the evidence as to one of the causes the jettison is of the character here indicated, can we say with reasonable certainty against a verdict of a jury and the action of the court, that the existence of this cause was necessary to produce the effect. While we can not say that we are entirely satisfied with the verdict, yet we can not set it aside for this cause, under these circumstances.

The plaintiff in this case was the master of the bark, and two-thirds owner thereof. In addition to the matter of unseaworthiness, the insurer plead that the loss was occasioned, not by a peril insured against, but by the unskillful navigation and gross negligence of the assured himself. He also plead that the master designedly cast away the bark. It is insisted that the evidence establishes both or one of these pleas, and that the verdict of the jury should have been set aside by the Circuit Court for that reason.

The direct and proximate cause of the loss of the bark was stranding on the American shoals during a gale, and in waters in which exists a current, the course and velocity of which varies. This is a peril of the sea. The general rule where barratry is excepted from the risks which is this case, is that if the immediate cause of the loss is a peril insured against, it is no defense that the loss was remotely caused by gross negligence of the agent of the insured not amounting to barratry. This is the law as settled repeatedly by the Supreme Court of the United States as well as by the Court of Kings Bench, 3 Pet., 222; 10 Pet., 507; 11 Pet., 213; 3 Sum., 276; 5 Barn. 3 Ala., 171.

The pleas here are, however, that the efficient cause of the stranding was either the gross negligence or design of the assured himself. The underwriter is not liable to indemnify the assured for losses by the perils insured against directly incurred through the frauds or gross misconduct of the assured. Where a loss by the perils insured against may have been remotely occasioned by the fault, or negligence, or want of the greatest degree of vigilance, prudence, and forecast of the assured, and yet, without his being at all aware of such consequence, there are not wanting authorities establishing the liability of the underwriters to make indemnity. This liability undoubtedly does not extend beyond the *bona fide* acts

of the assured, nor does it extend to all *bona fide* acts. This is the language of Mr. Phillips upon this subject. 1 Phil. on Ins., 3d ed., 589. Mr. Arnould, in his work on insurance, 2 Arn., 777, says it is not every mistake in judgment on the part of the assured that will discharge the underwriter, although such mistake may have immediately brought about the loss. If the assured acted, though erroneously, yet with reasonable prudence, and a *bona fide* desire to do the best for all concerned, the insurer will still be liable.

The following is a condensed statement of the evidence applicable to these pleas, and we must analyze it to determine the character of the act established by it.

Mate.—From six to twelve A. M. of Dec. 26th, we were steering in an easterly direction about E. to E. by N., went about thirteen to fifteen miles in four hours, from 8 to 12, allowing one and a half knots for current in an easterly direction. At twelve our latitude was 24 degrees 8 minutes, our longitude 81 degrees some minutes, about forty-five miles from the Florida coast. [From 12 to 4 neither this, or any other witness gives the course of the vessel, and her course can only be determined by taking her position at 12 and 4 o'clock]. At four o'clock I saw a light which bore due north, the vessel then heading N. by W. It was an iron screw structure painted red, the lighthouse being red and the top white. It was about ten miles off. Did not notice land inside of the light. Had no wind at four, the weather was hazy and thick, there was a squall coming in an easterly direction. [The mate does not speak with great accuracy as to circumstancess between four and six]. What he says is that before six, vessel was heading N. N. E., was then on port tack, went about at six; the weather continued calm from four to six. What wind there was was from southward and westward. Had no steerage way on bark from four to six. At six he says a breeze sprung up with a squall from eastward, and that he saw a light about thirteen miles distant bearing N. N. W. one-half N. which he took to be Sombrero light. The vessel was heading N. E. by N. From about six to eight I was below. The weather during that time was raining and squally. Came on deck at eight, saw no light then. The vessel was heading at eight o'clock E. N. E., she was then on the port tack. After she came about, her course was N. E. by E. The wind was about S. S. E. The vessel was on the wind going about two knots an hour, after she went about, she was now on the starboard tack, she continued at that rate about three-fourths of an hour about quarter to nine o'clock. The wind then shifted more to eastward and the sails

fell back. I then put her on the port tack. The weather was squally, the wind so variable that I could not tell the exact course; thought it about N. E. This continued about one or one and one-half hours. She made about three or four miles from eight to ten; judged the course to be a north-easterly direction. My watch was from eight to twelve. I changed her course very often during my watch. She was sometimes to eastward, sometimes to north according to direction of the wind. Between eight and twelve, the wind was from all directions from N. E. to S. E. in general, and from eight until she went ashore was rainy and stormy. At ten a steady breeze sprung up from N. by W. Between ten and until she struck, wind sometimes N. N. W., sometimes N. one-half W. At ten she was on the port tack heading N. E. by E. The sea was running high from northward and eastward. Bark went about four and one-half or five knots per hour from ten until she struck. Towards ten I saw a light, while up in the mizzen, with a glass, thought it the same light seen at six from the bearing. Took it to be Sombrero light; it bore W. by S. It was only visible at times, this time I could not estimate the distance, as the weather was thick. It was a bright light and appeared to be fixed, took it for a fixed light. The vessel struck near twelve o'clock at night. When she grounded was on the port tack, course N. E.—another place N. E. one-half N. Went about four or five knots per hour from ten to twelve. Wind about N. by W. or N. N. W. with a heavy sea from N. E.

Hitchings.—This witness says that during the day, on the 26th, the wind and weather was fair. Does not know the course of the vessel. That between seven and eight o'clock a light was discovered. At nine another light was seen; one was a revolving, the other a fixed light. Thomas Brown first saw the light. Heard the Captain call their names when he got ashore. Can't say how they bore, the course of the vessel, or how far the lights were off. He says the weather at night was squally. Bark struck at about quarter to twelve o'clock at night.

Brown.—Land was seen just before dark. Weather was variable and light, with rain all the voyage, up to when lights were seen. Light was seen about "dawn of evening—about dark." Was not on deck when lights first seen; lights bore on the weather bow when first seen. About a quarter to eight I saw two lights, one revolving, the other fixed. This was about three and three-quarters hours before bark went ashore. Captain told me the names. When I first saw them they were abeam of the ship on the weather bow,

and when going out of sight, about one and three-fourths hours before bark went ashore, were upon the port quarter. Course of vessel at quarter to eight was N. N. E. [In two other places says it was N. E]. Wind, when bark passed revolving light, was N. N. W. Saw the lights up to quarter to ten. Wind, when passing the lights, was S. W. Vessel struck between half after eleven and twelve.

Grant.—The wind was fair and the weather light up to seeing light-houses. Bark struck about twenty-five minutes to eleven. Saw a revolving light about five hours before, about twenty-five minutes to six. It bore to westward and northward pretty much ahead of the bark about ten miles off. It was Sand-Key light. Course of vessel about S. E. at the time. In another place, when lights first seen, bark heading N. W. Heard the Captain give the course S. E. to the man at the wheel. Wind while the lights in sight about S. W. A squall was making ahead. Captain first discovered the lights. Both Sand-Key and Key West lights in sight about four hours before she struck. Key West light bore about N. W. about thirteen miles off. The night was very dark. No moon, weather cloudy and squally. Vessel struck about twenty-five minutes to eleven. Her course then about S. E. Wind from S. W. She was close hauled and on port tack when she struck.

Protest sworn to by master, mate, boatswain, and the two seamen Grant and Brown :

“That the loss of the bark was owing immediately to adverse winds, heavy, squally and foggy weather, and a strong adverse current, which it is said sometimes sets in across the Florida Reef from the Gulf Stream.”

Evidence as to Weather.—One Witness for the defendant says the wind blew heavily in squalls ; another that the wind was very fresh and squally, a heavy sea heaving in ; another that the wind was blowing heavy, with violent squalls, a heavy sea, and the night dark, that the wind was about a reef-topsail breeze for a ship on the wind, but in the squalls it was much heavier. The mate says that from six to eight the weather was rainy and squally, and that from eight until she went ashore was rainy and stormy. About ten o'clock the sea was running high ; the squalls came on often ; they were very heavy ; sometimes had to lower the tops down and clew everything up.

Another witness says the weather on that night was a heavy gale of wind, a heavy dark night, raining heavily ; wind variable and squally. Another that the weather was stormy, and wrecking vessels were out.

Files.—I have navigated the waters in which the bark was lost nineteen years. The velocity of the current, which exists in these waters varies; there is no man living there, who can give a correct account of the current; it varies from the eastward to the northward, northward and westward; sometimes no current at all, at others about five knots. Upon being asked to state the course of the current on the night of the loss of the bark, with the wind in the direction it was, he answers: It is beyond my knowledge, and could not be told by any one raised there; it is beyond any man's knowledge to tell anything about the current; in general it is a subject of dispute.

F. Files.—Sombrero light can be seen seaward from eighteen to twenty miles, Key-West light about fourteen, and that Sand-Key light may be seen from ten to fifteen miles in bad and thick weather. The reflection from Sombrero and Sand-Key might be seen on a very clear night from the American Shoals. There is also in evidence a chart of the Straits of Florida.

If the mate's testimony gives the bearing of the light seen at ten, as well as the course of the ship and the direction of the wind at that hour, it follows that, if the light seen was Key-West light, a bearing of west by south would place the ship inside the reef at that time. If it was Sand-Key light, then the ship, if she was ten or fifteen miles from the light, with a northeast by east course, would be on a course which, if continued a few miles, would carry her on the reef at a point in the vicinity of American Shoals. If it was the light on Sombrero Key, which the mate says he thought it was, then a northeast by east course would not have carried her on the reef, and would not have placed her where she grounded, unless, instead of going forward in a northeast by east course ten miles, as he supposed, she went backward in a west by south course about forty miles around or through the reefs in two hours. The result of this is that, if any light was seen at ten o'clock, and there was no mistake in the bearing, it was impossible that the light seen could have been either Key-West light or the light on Sombrero Key, and that it was probably Sand-Key light.

What Hitches says in this connection amounts to little. He knows nothing of the course of the vessel, the winds or bearings of the lights.

From Grant's testimony no very satisfactory conclusion can be drawn. He says the bark's course at six or seven o'clock, while both lights were in sight, was southeast, and the wind southwest, and that when she ran ashore, about four hours afterwards, according to his estimate, her course and the direction of wind

were the same. He says nothing about the course of the vessel or wind during the four hours. All that can be said of this testimony is that if this vessel had a south-east course and a south-west wind for any considerable time before she went ashore, her going ashore could not be attributed either to neglect of the master in taking proper precautions to keep her off the shore, or to any design to place her there. She must have gone to the northward under these circumstances to get ashore, and unless there was some very extraordinary current operating, her going in that direction, under such circumstances would be impossible. The testimony of Brown is that the lights went out of sight about one and three quarters hours before the bark went ashore: that when going out of sight they were upon the port quarter. The lights seen, he says, were Key West and Sand-Key lights. The difficulty in this testimony is that the course of the vessel is not given for such a length of time as to enable you to make any safe calculation. The point at which the lights went out of sight is not readily fixed, and the precise course of the vessel is given only at quarter to eight o'clock, which was N.N.E. There are some legitimate inferences to be made, however, from Brown's entire testimony. If the lights went out of sight on the port quarter, the bark's course ought to have been somewhere between east, north-east, and north by east. Now a north by east course would, in all probability, have caused her to strike the reef, but an east, north-east, or north-east by east course would not have put her on the reef where she struck. An east north-east course would have been a course about parallel with the reef. A north-east by east course would have been a course for Sombrero light, and the bark must have come in sight of this light before striking the reef, thus enabling her to shape her course with certainty. Again, if we consider the mate's and Brown's testimony together upon the hypothesis that the light seen was Sand-Key light.—The mate testifies that at eight, when he came on deck, the vessel was on the port tack heading about east north-east. That about eight she came about and her course was north-east by east. Now the course given by Brown, at a quarter to eight, corresponds to some extent with the course given by the mate when he came on deck at eight. If the ship's course is continued by the mate upon the hypothesis that Sand-Key light was seen at eight, we find this: That at eight the bark came about and went for three quarters of an hour on that course, at the rate of two knots. From this testimony her position would be at this time about eighteen miles east by south of Sand-Key, and about ten or twelve

miles to the southward of American Shoals. The mate says that the wind at this time shifted to the eastward, that he then put her on the port tack, that the weather was so squally and the wind so variable that he could not tell her course for sometime. He thought it, however, about north-east. This course would have her heading toward Sombrero Key, about twenty-five miles distant. This, he says, continued about one and a half hours, but that he made only three or four miles from eight to ten. With this he could never have seen Sombrero light at ten with a bearing of west by south, nor could he have seen Sand-Key light at ten with this bearing. It is not a violent inference from the testimony of Brown and the mate, viewed in this aspect, to place the vessel at ten at a point south-west by west of Sombrero Key about twenty miles, and about east of Sand-Key twenty-four miles. At ten the mate has the bark heading north-east by east. This course would not have put her on the shoal from this point, but would have carried her a few miles to the southward of Sombrero Key. The mate says she was on a north-east course when she struck. We cannot see how this course, with a wind north north-west, or north half west, could have placed her on the shoal. With either of them he must have soon come in sight of Sombrero Key light, and thus been able to fix his position with some certainty.

These inferences are based upon the course of the ship, bearings of the lights, and the distances made as given by the testimony; calculations which any one with a chart can readily make. No estimate of the influence of the current or the effects of the adverse winds prevailing is made, and we cannot from this testimony form any definite opinion upon these subjects.

The defense is negligence of the master, and a different rule of law is applicable to his negligence than would be applicable to negligence of the other officers or crew which the master could not be expected to prevent with ordinary prudence and care. Now it is not established by this testimony that the master had anything to do with the changes made in the course of the vessel between the hours of eight and twelve, and while the general presumption is that the master of a ship directs her course and it is his duty so to do, yet in this case there are facts in the testimony which indicate a change of course by the mate between eight and ten o'clock without his sanction. The master was below when the vessel struck, and the jury had a right to infer that he was below during the mate's watch, as there was no evidence of his being on deck. The master may have left the deck at eight with an east north-east course, which was

a course about parallel with the reef. She soon came about, and her course was then north-east by east, according to the mate, which was a course not calculated to place her upon the reef from her then position. If the current was to the eastward, its usual course, then its tendency would have been to carry her from the shoal, and such also would have been the tendency of a north-west wind. Now all that can be said of this testimony is that, giving it the most reasonable construction that can be given, the shoaling of the ship does not appear to be a natural result following from it. This negatives any idea of design. But it is said that as the courses thus given do not account for the ships shoaling, therefore there must have been gross negligence in the navigation; if the courses did not place her there then we have gross negligence established, if they did then there was design. The proposition is too broad; you must prove some act of negligence.

There are some statements of the seamen to the effect that the captain, after the stranding, expressed a desire that the bark might break in two, and one of them states that he heard the captain say to the mate, "here is my course, but I will put her in here." This is all he appears to have heard of the conversation. If the jury came to a conclusion in this case based upon a general view of the facts of the case, either rejecting this evidence or giving it a favorable construction, their action in this respect affords no ground for setting aside the verdict.

This matter must be solved by the application of the rules of evidence to this testimony. Where the assured establishes a loss, and shows that the direct and proximate cause of it is a peril insured against, then the insurer can relieve himself by showing that the efficient and direct causes of encountering the peril was the failure on the part of the assured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation and care of the vessel. The insurance here is upon the freight. The insurer engages that fortuitous dangers shall not prevent the voyage and earning of this freight, provided due means are used by the assured to attain that end. When this duty and this due means are neglected, the assured discharges the insurer from the direct consequences of such neglect, and takes upon himself the risk incident to his negligence or misconduct. Judge Story, in delivering the opinion of the court in *Columbia Insurance Co. vs. Lawrence*, 10 Pet. 507, remarks that a loss by fire, occasioned by the mere fault and negligence of the assured, or his servants or agents, an

without fraud or design, is a loss within the policy. This doctrine was also announced by the Supreme Court of New York, in 16 Barbour 127. These are both cases of insurance against fire on land.

Our examination of the case in the Supreme Court of the United States does not disclose that the neglect of the assured himself was set up as a defense in that case. However this may be as to fire insurance upon land, the elementary writers, Phillips and Arnould, upon the subject of marine insurance state the rules as we have quoted them. This seems to be the view of Lord Mansfield in the case in 1 Burr 341, where he states the general rule as to risks taken by the insurer. It is the view of Lord Ellenborough, as expressed in 1 Camp. 436, and it is the rule announced in 20 Wend 303, and 26 Wend 581. Chief Justice Marshall, in the same case where Mr. Justice Story announced the rule above stated, says: "Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest." 2 Pet. 49. Certainly an assured's interest, as a general rule, would suggest ordinary care and prudence. See also Chan. Kent's views in 1 Caines Cases in Error, 11; also 3 Kent's Com. 300, 5 Hammond 435. In addition to these authorities the rule we announce is the only one consistent with the general principles incident to the contract in other respects. The implied warranty of seaworthiness requires at the hands of the assured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract.

There is no doubt that the burden of proof is here upon the underwriters. This negligence must appear from the plaintiff's case, or defendant must prove it. The presumption is with the assured, after proof of loss. 4 Mason 441; 12 Wheat. 383, 45 R. 37; 4 Camp. 234; 1 Burr 347.

In this view what is the present case? Unless we are prepared to say that so shaping the course of the vessel upon this voyage as to come in sight of the lights in the Straits of Florida establishes such neglect, want of care, or bad faith upon the part of the assured as excuses the insurer, we cannot disturb the verdict. This we cannot say. The lights are placed there to be seen and as points of departure for the voyage up the Atlantic. The evidence shows the existence of adverse winds and stormy weather, upon the night of the shoaling as well as the existence in these waters of a current whose velocity and course varies.

In the absence of any satisfactory proof showing negligence or design as the direct cause of the shoaling we cannot disturb the verdict.

The questions of seaworthiness and care in the navigation of this ship just disposed of are, in the language of Mr. Justice Story, "questions of fact, dependent upon nautical testimony, and are incapable of being solved by a Court without assuming to itself the province of a jury, and judicially relying upon its own skill in maritime affairs." *McLanahan vs. the Universal Ins. Co.*, 1 Peters 184. The Supreme Court of the United States will not control the discretion of the Court in the matter of refusing new trials in such cases, and is thus relieved of the responsibility of considering conclusions reached by juries in such matters. Here the statute makes it our duty to do so. We refer to the remark of Judge Story to indicate to counsel the very great propriety of settling questions of nautical science by the testimony of experts in that science. Their opinions are, certainly, more satisfactory than the opinions of persons not thus skilled. When parties upon either side neglect to produce such testimony, all unfavorable consequences resulting from its absence must be attributed to their own acts.

The next point arising upon the testimony which we consider is, that the evidence discloses that, at the time the contract of insurance was entered into, a large part of the freight to be earned had been paid to the plaintiff—that the amount of freight at risk was less than that covered by the policy, and that the verdict for the full sum is erroneous. Under the terms of the charter party, as well as the contract indorsed on the bill of lading, the moneys paid to the master were advanced against the freight, and were to be deducted therefrom. This is also a valued policy. The general rule is, that the insurable interest of the owner of the vessel extends to the whole amount of the freights to be earned by the voyage; and when its value is fixed by agreement, that is conclusive in the absence of fraud. Does the fact that he has pledged it to a third party as a fund from which to redeem a loan, giving him a lien upon it, change the rule. Under such a contract equities as to the freight arise in favor of the party making the advances, and he may have an insurable interest to the extent of his loan, but it does not follow that the insurable interest of the owner is diminished to the extent the freight is pledged. One who has pledged or mortgaged his interest in the ship, even to the extent of its full value, has still an insurable interest to the full value. 1 Phillips 41; 2 Pick. 258. In this case there is a pledge of freight to be earned. The same rule which permits a mortgagor of

the ship to insure for its full value, must permit a party receiving a loan or advance against the freight to insure that freight. The effect of this pledge of the freight is not relief from the debt, in case the freight is not earned, in the absence of a stipulation to that effect. Whatever doubt may have existed in England upon that subject the doctrine in this country is that, "if freight is paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary." 3 Pick. 20; 11 Mar. 360; 3 Kent's Com. 227; 3 Sumner 66. We have no doubt of the owner's insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it.

It is alleged that there was concealment in reference to the condition of the ship at the time the policy was applied for. This is a matter to which the implied warranty of seaworthiness extends, and the assured is not obliged to communicate any fact as to which there is a warranty express or implied, unless information upon the subject is particularly called for in the first instance. 20 John 214; 4 East. 590; *Annesly on Ins.* 143; 12 Maryland 343.

The judge charged the jury in this case as follows: If you find, from the evidence, that the master of the *Mutter Schultz* designedly cast away and destroyed his vessel you must of course find for the defendant. In determining this question you must be satisfied beyond a reasonable doubt that the master did designedly cast the vessel away before you can find against him on this point.

This charge was excepted to, and is assigned here as error.

This defense involves a serious charge affecting the character of the master. It is a crime. It is not denied that this would be the rule if this was a prosecution of a criminal character. Does the fact that in this case the question arises simply as a defense in a matter of civil contract vary the rule as to the degree of proof which should be required? Now, the fact to be proved, whether its proof be in a civil or criminal case, is the same—the casting away of the ship by design—and the rule is that the same amount of proof which exists in one case must exist in the other—that is to say, the conclusion to be established cannot be inferred from one state of facts in a civil case and another state of facts in a criminal case. The reason why strict proof is required is not that the one case or the other is civil or criminal, but because the nature of the conclusion to be reached in each case is of such character as the law requires strict proof to establish it. The rules of evidence are the same in civil and criminal cases. *Green Ev.*, 10 ed., par. 65; *Abbott J. in 2 Starkie* 116. "A

fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence." 2 Russell on Crimes, 589.

The cases upon this precise point do not entirely coincide. In *Thurtell vs. Beaumont*, 1 Bing. 339, the defense was that the property insured was wilfully burnt by the plaintiff himself. The judge directed the jury that "before they gave a verdict against the plaintiff, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action as would warrant their finding him guilty of the capital offense, if he had been tried before them on a criminal charge. Mr Justice Slidell, in 1 La. Ann. 219, speaking for the Supreme Court of Louisiana, says: "We think that the jury should not have been instructed to require the same full proof to discharge an answer as would be necessary to convict the assured. The position of the claimant in the one case and the prisoner in the other are not identical." The same Court, however, in a subsequent action upon a policy of insurance, held that, "Where a criminal charge is to be proved, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion;" and although it was a civil proceeding pending, the Court applied this rule. The decisions upon the precise point, therefore, establish the rule to be, that the character of the fact to be proved, and not the position of the party, determine the degree of proof to be required. There was no error in this direction of the Court.

The only error assigned remaining to be considered is, that the Court entered judgment upon a verdict which was illegal and insufficient.

The verdict was in these words: "We, the jury, find for the plaintiff, and assess the damages at six thousand dollars, with interest from the commencement of this suit at legal rate." There is no difficulty in the clerk's calculating the interest from the date of the commencement of the suit to the date of the verdict; the periods are fixed by the verdict. There is no difficulty as to the rate. There were no issues in respect to interest, and interpreting the verdict with reference to the issues, the necessary conclusion is that the interest is at the rate prevailing in the jurisdiction of the Court. The general rule is, that a verdict must convey on its face a definite and precise meaning, and must show just what the jury intended. If there had been issue here as to the rate of interest, or any question of this character, such an issue would not have been determined by the verdict, and in such a case there might have been doubt as to the intention of the

the jury. In this case we think there is none, and that their conclusion is expressed with sufficient certainty to justify a judgment thereon.

In leaving the matter discussed in this appeal, we remark that, among other things wanted, the case stated is not signed or verified by the judge. This is a fatal defect; the only thing which gives verity to the correction and settlement of a case in this Court is the signature of the judge. 32 Rules of Practice Circuit Courts.

The judgment is affirmed with costs.

SUPREME COURT OF ERRORS, CONNECTICUT,

SEPTEMBER TERM, 1871.

ELIZABETH LEMON,
vs.
 PHOENIX MUTUAL LIFE INS. CO.* }

Where the assured surrendered a policy upon his life for his own benefit, and took out another payable to the plaintiff, with whom he was under an engagement of marriage, informing her of what he had done, and at her suggestion placed it in the hands of her brother, there was an executed gift of the policy to the plaintiff.

Where the assured gained possession of this policy, without the plaintiff's consent and surrendered it to the company, without her knowledge, for a third policy payable to his brother, the plaintiff is equitably entitled to the benefit of the third policy.

The assured was interested in the third policy to the amount of the premium paid at the time of taking it out, and the amount of the premium with interest must be deducted from the amount due on the policy.

The assured could obtain an insurance on his own life payable in case of his death to a third party and the delivery of the policy to such party as a gift, is effectual.

Where no interpleader is filed by the defendant, judgment will be given for the plaintiff notwithstanding another party is claiming the money by the terms of the policy.

A bill will be amended to correspond with the facts as found and the grounds upon which relief is granted.

SEYMOUR, J.

In January, 1868, the defendant issued a policy on the life of George C. Peterson for \$3000, this was in the usual form of an endowment policy and no question arises upon it.

In November, 1868, this policy was surrendered and cancelled, and at the request of the assured a new policy issued in its place

* Decision rendered February —, 1871.

like the former in every respect except that it was payable to the petitioner, with whom the assured was under an engagement of marriage.

The leading question in this case is whether the petitioner became the owner of this second policy.

It is not claimed that the mere fact of making the policy payable to Miss Lemon, without more, vested in her a complete title. It is conceded that so long as Mr. Peterson retained it in his own possession he might control it as his own. On the other hand it is not doubted, but that if Mr. Peterson delivered it to Miss Lemon as a gift to her, such delivery would vest in her a complete title.

The difficulty in the case is in determining whether on the facts found the policy may properly be regarded as having been in legal effect delivered to her.

This is so much a mere matter of fact that the committee should have distinctly found it the one way or the other, but instead of a direct finding we have a special statement of facts bearing on the question, and it is left to the court to decide the ultimate fact by inference from this special statement. Neither plaintiff nor defendant saw fit to remonstrate against the acceptance of the report of the committee, on the contrary the report is accepted without objection from either party; and we must dispose of the question as best we may with the light we have.

1st. The fact that Mr. Peterson caused the policy to be made payable to Miss Lemon indicated a settled purpose in his mind that she should have the benefit of it. And his acts immediately after will naturally be construed as intended to carry out such purpose.

2d. When, therefore, the policy is, by Mr. Peterson's order, sent to Miss Lemon's brother, we naturally regard it as sent to him *for her*, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself.

3d. It appears from the committee's report that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother.

4th. After the policy was changed, and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done.

Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her.

In December, 1868, Mr. Peterson changed his mind in regard to this policy, and obtained possession of it from Mr. Lemon, by what means does not distinctly appear. But the committee's report gives no countenance to the idea that it was by fraudulent means, as charged in the bill. It does, however, appear that the possession was obtained without the petitioner's consent, and also that she had no knowledge of the second change of the policy, now to be spoken of, until after Mr. Peterson's death.

In January, 1869, Mr. Peterson, having, as before stated, obtained possession of policy No. 2, caused it to be surrendered, and a new one—No. 3—to be issued in its place, payable to Peter A. Peterson, a brother of George.

George went South for his health, which was failing, starting Nov. 30th, 1868, and he was not able to do business after that time till his death, October 19th, 1869. His health was not such as to enable him to pass the necessary medical examination for a new policy in November, 1868, or afterwards.

Upon these facts it is clear that the consideration for policy No. 3, was the surrender of policy No. 2. Mr. Peterson's health was such that No. 3 would not have been issued if the defendant had not been bound by No. 2, and inasmuch as policy No. 2 belonged to the petitioner it was her property, that, without her consent, was used to procure No. 3. She is therefore equitably entitled to the benefit of this policy.

Mr. Peterson's money however to the extent of the premium paid in Jan. 1869, is represented in policy No. 3, and to that extent Miss Lemon has no interest, and from the \$3,000 due on the policy, the amount of that premium and interest on it should be deducted, and the balance paid to the petitioner.

A question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life. If she had undertaken to obtain and had herself obtained an insurance on his life that question might have arisen, but surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it; and we know of no law to prevent him from making the policy payable in case of his death to the person to whom he was affianced; and if such policy is delivered as a gift to the party to whom payable, we know no law to prevent such gift from being effectual. In *Rants vs. American Life Insurance Company*, 27 New York R. 282, Judge Wright says: If the contract is with the party whose life is insured he may have the loss payable to his own representatives or to his assignee or appointee. Besides, the defendant treated

policy No. 2 as valid,—it appears that policy No. 3 was issued in consideration of the surrender of No. 2, as before stated, and the question now to be decided is not on the validity of No. 2 but whether Miss Lemon has an equitable interest in No. 3.

The defendant also claimed that the petitioner ought not to have judgment in her favor while another is claiming the money by the terms of policy No. 3.

We appreciate the difficulty of the defendant's situation, exposed as he may be to a suit by Peter A. Peterson. If the defendant had brought a bill of interpleader in Canada, or elsewhere, before a court having proper jurisdiction, this case would probably have been continued to await the result. But no bill of interpleader has been brought, and upon the pending bill if the petitioner shows herself entitled to the insurance money we must decree it to her notwithstanding the possibility that upon a suit by Peter A. Peterson the facts may appear otherwise than they do to us.

The petitioner has done all she could to make Peter A. Peterson a party to this bill. He has been notified of its pendency and he has had an opportunity to appear and show his title if he has any. He evidently chooses not to enter an appearance. We are not called on to say what effect, if any, these circumstances would have upon any suit which he may bring against the defendant either here or in another jurisdiction.

We advise the Superior Court to pass a decree in favor of the petitioner, to the extent and in the manner above specified. We ought, however, to say that it has not escaped our attention that the bill is not in its allegations precisely adapted to the facts as found by the committee, nor precisely to the grounds upon which relief is granted. But no point was made by the defendant on this account, and, if any question had been made, we probably should have advised, as has been done in similar cases, that the bill be amended to correspond with the case as shown by the report of the committee.

In this opinion the other judges concurred; except Carpenter J., who dissented.

SUPREME COURT OF MISSOURI,

JULY TERM, 1871.

Appeal from Pettis Circuit Court.

EUGENE LUNGSTRASS, *Resp't*,
vs.
 GERMAN INSURANCE COMPANY, *App't.** }

The plaintiff was agent for the Company, and was to make his returns monthly. The Secretary of the Company, upon his application, sent him a policy upon his own goods which he received, and on the same day made an entry in his account with the Company of the premium, and accepting the policy. On the next day before the time of making his monthly returns his goods were burned.

Held, that no contract can arise from a proposition or offer, on one side, until it is accepted on the other, and this acceptance must be evidenced by some act that binds the party accepting.

The usual mode of accepting a proposition made by correspondence is by a notice of acceptance; and though it was formerly held that it did not ripen into a contract until receipt of the notice, yet the doctrine now is that the contract is completed when the acceptance is forwarded, without reference to the time of its reception.

Notice is not the only evidence of acceptance. Any appropriate act, which accepts the terms as they were intended to be accepted, so as to bind acceptor, just as clearly evidences the concurrence of the parties.

The entry made by the plaintiff in his account with the Company unequivocally shows that he intended to abide by the policy, and he thereby became bound by its terms.

Express notice of acceptance can only be dispensed with when apparently not contemplated, and when some other act of acceptance is equally clear and unequivocal.

FINKELNBURG & RASSIEUR, } *for Appellant.*
 CRANDALL & SINNET,
 PHILLIPS & VEST, *for Respondent.*

BLISS, J.

The plaintiff holds a policy of insurance issued under the following circumstances: He had been appointed agent of defendant for Sedalia, and on the 28th of October, in response to applications obtained and forwarded by him, the Secretary sent him policies numbered 294, 295 and 296, the first being a policy upon his own goods. The premium charged was two and a half per cent., and, being dissatisfied with the rate, the plaintiff sent back his own

* Decision rendered July —, 1871.

policy for a reduction. It was reduced to two per cent. and returned, and the plaintiff claims that he received it on the 6th of November, and that on the same day he made an entry in his account with the Company, recognizing the change of rate, and accepting the policy as changed. Early in the morning of the 7th the plaintiff's goods were burned, and on the 8th he telegraphed the fact, claiming the benefit of the policy. The Company, by its Secretary, at once repudiated it, upon the alleged ground that the premium had not been remitted, but now claim it to have been invalid because no notice of its acceptance was sent to the Company.

Counsel for appellant contend that this case comes under the rules governing contracts by correspondence, and that the contract was not consummated.

It is true that no contract can arise from a proposition or offer on one side until it is accepted on the other; until then it remains merely a proposition. And it is also true that this acceptance must be evidenced by some acts that binds the party accepting. A man's mental resolution, that can be changed, is not sufficient; both parties must be bound, or neither will be. The usual mode of accepting a proposition made by correspondence is by notice of acceptance, and though it was formerly held that it did not ripen into a contract until receipt of the notice, yet the doctrine now is that the contract is complete when the acceptance is forwarded, without reference to the time of its reception. *Kentucky M. Ins. Co. vs. Jenks*, 5 Ind. 96; *Halleck vs. Com. Ins. Co.*, 21 Dutcher 280; *Taylor vs. M. F. Ins. Co.*, 9 How. 390. But notice is not the only evidence of acceptance. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties—the bringing their minds together—as a formal letter of acceptance. The terms, the nature of the offer, or circumstances under which it is made, or relation of the parties, may indicate another mode; and if so, its adoption equally binds them.

The plaintiff, as agent, was to make his returns monthly, and when the fire occurred the time for making his current monthly return had not arrived. The Secretary, on his appointment as agent, had given him a book, being "the tariff of rates and general instruction book for the exclusive use of agents" of a Cincinnati company, saying to him that the company had adopted their rules until some could be printed in its own name. Among them was the following:

"21. Insurance of your own property. If you have property of your own which you desire to have insured, * * * please forward us your application fully made out and signed, and if the risk is such as we can take, will make you a policy at this office at a fair rate, and mail it to you promptly. * * * You will enter the risk on your abstract and take credit in your next account current for commission on the premium, as if the policy had been issued by yourself."

There may be some ambiguity in this instruction, but both parties seemed to understand it to mean that, as to all things but the acceptance of the risk, fixing the rate and issuing the policy, the transaction was to be the same as with an outsider through the agent, *i. e.* as the agent delivers the policy, receives the premiums, and credits the company with them to be remitted at his next return, so he credits the company with his own premium, to be remitted in like manner. The following letter, in reply to the applications forwarded by him, including his own, No. 294, also shows this understanding:

"Enclosed transmit to you			
Pol. 294	\$51 25		\$42 75
" 295	37 25		30 85
" 296	31 25		25 75

For which you are charged with \$99 35"

Here no notice of acceptance and no remittance was required, but plaintiff was charged with the premiums less the commissions, including his own. Had the plaintiff been satisfied with the rate charged him, would any other notice of the acceptance of the policy have been thought of than the entry of the charges to the credit of the company, which was at once made? But he was dissatisfied with his own and sent it back for abatement. It was returned reduced to two per cent., and, as the plaintiff testifies, received on the 6th of November, and the difference charged back to the company. After the fire, and in response to its announcement, the secretary sends the following telegram: "Policy 294 is not in force, as the premium was not paid; see our letter of November 4th." No objection is made because notice of acceptance had not been sent, but only because the premium was not remitted; and the letter of November 4th, to be hereafter considered, makes the payment of all premiums at the company's office, as well as that of No. 294, a condition precedent to the taking effect of the policies; and so far as notice is concerned, aside from such remittance, it negatives the idea that it was expected; and indeed the

whole record shows that notice of the acceptance of the policy was not contemplated at the time, and was only thought of after this controversy arose.

I assume that, previous to the letter of November 4th, it was the understanding that remittances were to be made monthly, for so plaintiff and the secretary testify; and I assume, what seems to have been the clear understanding, that the premiums on the plaintiff's policy were to be credited and remitted like the others. The inquiry then arises whether anything was done by the plaintiff after the second receipt of the policy, and before the fire, that amounted to an acceptance of its terms and bound him to pay the premium. He exhibits his account with the company, and testifies that every entry was made at its date. We find under date of October 28th a credit of each of the premiums as in the statement forwarded, and under date of November 6th, the day before the fire, an entry of a charge to the company of the difference between the original premium and as reduced to two per cent. This act unequivocally shows that he intended to abide by the policy as last received, and he became thereby bound by its terms; and had there been no fire, nothing further was to be done until the time for remittance at the end of the current month.

I have alluded to the letter of November 4th, which contains the following postscript: "We call to your attention that policies go into effect only when premiums are paid here." There is a conflict of testimony in regard to the time of its receipt, the plaintiff testifying that it did not come to hand until the 8th, while the company's secretary says that it was mailed at its date, in which case it should have been received on the 5th—an important variance; but we cannot pass upon these questions of fact, and will only consider whether the instructions to the jury conform to our view of the law.

Most of those asked by defendant assume that the policy could not go into effect without express notice of its acceptance, when other acts could as well signify acceptance and bind the parties. They were therefore properly rejected.

Instruction No. 3, given on behalf of plaintiff, predicates the validity of the policy upon its having been assented to before the fire, and neither notice nor any other appropriate act signifying assent and binding the insured is required. This instruction was at least defective, and we cannot say that it did not mislead the jury. Express notice of acceptance can only be dispensed with when apparently not contemplated, and some other act of accept-

ance is equally clear and unequivocal. The record shows conflicting evidence in regard to facts bearing upon this question, and for this instruction I think a new trial should be granted.

Reversed and remanded. The judges concur.

SUPREME COURT OF MISSOURI,

FEBRUARY TERM, 1872.

Appeal from Clinton Circuit Court.

THOMAS W. FAYLES, *Resp't*,
vs.
NATIONAL INSURANCE COMPANY, *App't.** }

The by-laws of the company provided that the general agent should have power to appoint, remove and direct the local agents and to exercise a general supervision over the agency department, with power under the direction of the executive committee to compromise and settle claims arising from loss and damage.

The agent drew a bill of exchange in the name of the company, in favor of the insured, in payment of a loss he had suffered, which bill was assigned and transferred to the plaintiff.

On the trial in the court below the plaintiff offered evidence to show that the agent had drawn similar bills in like cases, which were paid by the company.

Held, That if an officer of a corporation openly exercise a power, which pre-supposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed.

When the by-laws gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and when it was seen that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, and that these drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose.

The evidence was clearly admissible and the judgment for the plaintiff must therefore be affirmed.

WAGNER, J.

The only point saved in the record, and presented for our consideration, is the ruling of the Court on the admissibility of the plaintiff's evidence.

The action was founded on a bill of exchange, purporting to be drawn in the name of the defendant, by its general agent, in favor of one Otterman, in payment of a loss which he had sustained by

* Decision rendered March —, 1872.

fire on a building, which was issued by the defendant. The bill was assigned and transferred to the plaintiff.

The answer denied the authority of the agent to draw the bill and make it binding on the Company.

For the purpose of showing authority, plaintiff gave evidence showing that the agent had drawn similar bills in like cases, and that said bills were paid by the Company.

This evidence was objected to, but the objection was overruled, and it was admitted by the court. Defendant introduced in evidence the by-laws of the company, the fifth section of which provides, that the general agent shall have power to appoint or remove local agents, give them general directions and instructions, render them such assistance as may be necessary to secure business, and also have the general supervision of the agency department. Power is, moreover, given him, under the direction of the executive committee, to compromise and settle claims arising from loss and damage. The trial was before the court without a jury and judgment was for the plaintiff.

If the evidence was admissible the verdict cannot be disturbed.

In the case of the First National Bank of Kansas City vs. Hogan, 47 Mo. 472, the proposition was laid down that a draft signed by an officer of an insurance company alone is not binding on the company where there is no evidence of any usage or law giving him authority to bind the company.

There it was shown that the secretary signed the draft and acted for the company, in the capacity of secretary. But the signing was the only thing from which authority was attempted to be deduced. It was not shown that, in a single instance except that one, that he ever undertook, as secretary, to make a draft on the company's agent. As no direct power was asserted, the signing in one single case would not amount to evidence warranting the conclusion that such authority was devolved on him. If an officer of a corporation openly exercises a power which pre-supposes a delegated authority, for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed. Therefore, when the by-laws gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and when it was seen that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, and that these drafts were honored and paid off, the com-

munity, and those who dealt with him, had a right to presume that authority had been delegated to him for that purpose.

The general principles governing such cases was adjudged by this Court in *Stoddard vs. Aull*, 7 Mo. 318, where an agent purchased certain articles for his principal, and gave a note in the principal's name therefor. He had also given two other notes in the principal's name, which had been discharged. No special authority had been given him to execute the notes. Upon these facts it was held that an authority to purchase articles on credit would imply a power to acknowledge an indebtedness in the name of the person for whom they were bought; that a recognition by the principal of the agency, in the particular instance, or in similar instances, was evidence of the authority of the agent, as where one signed policies in the name of another, who, when a loss occurred, paid the same, that would be evidence of a general authority to sign policies. I think the evidence was clearly admissible, and the judgment must therefore be affirmed. Judge Bliss concurs, Judge Adams absent.

STATUTE LAWS.

ILLINOIS.

AN ACT relating to the deposits to be made by foreign Insurance Companies.

SECTION 1. When any fire, or fire and marine, insurance company, organized under the laws of any foreign government, shall file with the Auditor of Public Accounts a certificate of the Superintendent of the Insurance Department of any other State, stating that a deposit of \$200,000, or the equivalent of that amount, for the protection of the policy-holders in the United States, has been made by said Company, in that State, in accordance with the existing laws thereof, said Company shall not be required to make such deposit in this State, so long as said deposit shall remain intact with the Superintendent of the Insurance Department or Treasurer of said State, a certificate of which from the Superintendent of the Insurance Department of that State shall be annually filed with the Auditor of Public Accounts of this State.

§ 2. All fire, or fire and marine, insurance companies organized under the laws of any foreign country, establishing, or having heretofore established, an agency or agencies in this State, shall be and are hereby allowed to make the deposit required by the laws of this State, in such bonds, stocks, or other securities of such foreign country: *Provided*, the same shall not be received for more than their par value; nor shall they, in any case, be valued at more than their current market value.

§ 3. The recent conflagration in Chicago having deprived the people of the State of Illinois of the means of ample insurance on their buildings and goods, an emergency exists requiring this act to be of immediate force and effect; therefore, this act shall take effect and be in force from and after its passage.

Approved March 19th, 1872.

MISSOURI.

AN ACT To provide for the safe keeping of the deposits and securities deposited with the Superintendent of the Insurance Department of the State of Missouri.

Be it enacted by the General Assembly of the State of Missouri, as follows :

SECTION 1. It shall be the duty of the "Superintendent of the Insurance Department" upon receipt of securities from any Insurance Company to forthwith deposit the same in presence of the President, Vice President, or any authorized agent of the company, in a strong iron box which shall require two distinct and different keys to unlock the same, one key to be kept by the Superintendent and the other by the Company; and the box shall not be opened except in the presence of the Superintendent and said President, Vice President, or authorized agent of the company. The boxes shall be kept in the vaults of the "Safe Deposit Company of Saint Louis," and the Insurance Companies shall pay the usual fees for the safe keeping of their respective boxes.

§ 2. All other acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 3. This act shall take effect and be in force from and after its passage.

Approved, March 14th, 1872.

MINNESOTA.

AN ACT To establish a reciprocal General Insurance Law for the State of Minnesota, and to revise and amend the laws of said State relating to home and foreign insurance companies.

Be it enacted by the Legislature of the State of Minnesota :

TITLE I.

GENERAL PROVISIONS.

SECTION 1. The object of this act is to revise, simplify and amend the laws of this State in relation to insurance, with due regard to the legislation of other States, so as to secure mutual harmony in the promotion of the public interest; to define the relation of the State to companies and individuals; to insure the stability of companies; to protect the interest of the assured, and to encourage the employment of capital. And its provisions are

to be construed liberally in furtherance of the protection of the insured, and so far as may be in harmony with the construction which may be given by the courts of other States adopting a like act.

§ 2. The words "the substantial provisions of this act shall be enacted," shall be construed to mean the provisions of this act which define the right to do insurance business, and provide for the stability of companies, and the protection of the insured; and differences in respect to the organization of the insurance department, the constitution of companies, or the form of judicial remedies, shall not be deemed to impair the uniformity which this act is intended to secure.

§ 3. When, by the laws of any other State or nation, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this State doing business in such other State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other State or nation doing business in this State, and upon their agents here.

§ 4. The term "company," as used in any provision of this act, subjecting companies to any obligation or restriction, includes individuals, partnerships, joint stock associations and corporations.

§ 5. The term "American Company," as used in this act, designates a company which exists by the laws of any State or territory of the United States, or by any law of the United States. All others are designated as foreign.

§ 6. The expression "company of a State, territory or nation," as used in this act, means a company incorporated by or organized under the laws of such State, territory or nation.

§ 7. The word "commission" designates the officer, by whatever name called, who is charged for the time being with the duties of commissioner of insurance.

§ 8. The term "oath" in this act, includes affirmations. The term "directors" in this act, designates the trustees, managers, or officers constituting the executive board of a company. Directors are included in the term "officers," unless a contrary intention appears.

The term "agent" or "agents" in this act, includes an acknowledged agent, surveyor, and all other persons who shall in any manner, directly or indirectly, aid in transacting the business of insurance. Nothing contained in this act shall be construed to

imply that an agent has any power to bind a company, not expressly, or by necessary implication, given him by the company.

TITLE II.

THE INSURANCE COMMISSIONER.

SECTION 1. It shall be the duty of the Governor, by and with the advice and consent of the Senate, to appoint one competent person, a resident and citizen of the State, and with the other qualifications hereinafter provided, who shall be styled the Insurance Commissioner, who shall be sworn in the manner provided by law for other State officers. He shall hold his office for two years, and execute the duties thereof as herein provided, until his successor is appointed and qualified, and in case of a vacancy by death, removal, resignation or otherwise, the Governor shall fill the same by appointment.

No person who is a director, officer, agent, attorney, or stockholder of, or directly or indirectly interested in, any insurance company except as insured, shall be commissioner, and no officer or agent of any insurance company doing business in this State shall be deputed to examine the affairs of a company under this act. The said commissioner shall keep his office, at the capitol of the State, and shall give bonds in the sum of \$5,000, with two sureties to be approved by the Governor, for the faithful discharge of his duties.

§ 2. Said commissioner shall be entitled to an annual salary of \$1,500 per annum, which shall include and cover all necessary expenses, clerk hire, office rent, stationery, etc., (except such necessary blanks and forms as may be required, which shall be provided by the State), the said salary to be paid by the State Treasurer in the same manner as other State officers are paid, and if the said commissioner shall, directly or indirectly, receive any compensation or pay for any services or extra service, or for neglect or omission of service, other than is provided in this act, he shall be deemed guilty of a felony, and, on conviction thereof, shall be subject to a fine not exceeding five thousand dollars, or imprisonment in the State prison for a term not exceeding five years, or both, in the discretion of the court.

§ 3. It shall be the duty of such Insurance Commissioner :

1. To see that all laws of this State respecting insurance companies are faithfully executed.

2. To file in his office every charter or declaration of organization of a company, with the certificate of the Attorney General,

and, on application of the corporators, to furnish to them a certified copy thereof.

3. He shall, as soon as practicable, in each year following the passage of this act, calculate, or cause to be calculated, in his office, by officers or employes of his department (or bureau) the net value, on the 31st day of December of the previous year, of all the policies in force on that day, in each life insurance company doing business in this State, organized by authority of this State, and every other life insurance company doing business in this State, that shall fail to furnish him, as hereinafter provided, a certificate of the insurance commissioner of the State by whose authority the company was organized, or by the State in which it may elect to have its policies valued, and its deposits made in case the company is chartered by the government of the United States, giving the net value of all policies in force in the company on the 31st day of December of the preceding year.

4. Calculations of the net value of each policy must be based upon the American Experience Table of Mortality, and six per cent. interest per annum. And the net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality, and rate of interest designated above.

5. In case it is found that any life insurance company doing business in this State has not on hand the net value of all its policies in force, after all other debts of the company and claims against it exclusive of capital stock, have been provided for, it shall be the duty of the insurance commissioner to publish the fact that the then existing condition of the affairs of the company is below the standard of legal safety established by this State, and he shall require the company at once to cease doing new business; and he shall immediately institute proceedings, as required in this act, to determine what further shall be done in the case.

6. It is hereby made the duty of the insurance commissioner, after having determined, as above, the amount of the net value of all the policies in force, to see that the company has that amount in safe legal securities, of the description and character hereafter provided in this act; after all its other debts and claims against it, exclusive of capital stock, have been provided for.

7. He shall accept the valuations made by the insurance commissioner of the State under whose authority a life insurance company was organized, when such valuations have been properly made on

sound and recognized principles and legal basis, as above; provided the company shall furnish to the insurance commissioner of this State a certificate from the insurance commissioner of such State, setting forth the value calculated on the data designated above, of all the policies in force in the company on the previous 31st day of December; and stating that, after all other debts of the company, and claims against it at that time, were provided for, the company had, in safe securities, of the character specified in this act, an amount equal to the net value of all its policies in force, and that said company is entitled to do business in its own State.

8. Every life insurance company doing business in this State during the year for which the statement was made, that fails promptly to furnish the certificate aforesaid, shall be required to make full detailed lists of policies and securities, to the insurance commissioner of this State, and shall be liable for all charges and expenses consequent upon not having furnished said certificate.

9. For every company doing fire insurance business in this State, he shall calculate the reinsurance reserve for unexpired fire risks, by taking fifty per cent. of the premiums received on all unexpired risks that have less than one year to run, and a pro rata of all premiums received in risks that have more than one year to run; provided, that when the reinsurance reserve, calculated as above, is less than forty per cent. of all the premiums received during the year, the reinsurance reserve in this case shall be the whole of the premiums received on all its unexpired risks.

10. In marine and inland insurance he shall charge all the premiums received on unexpired risks as a reinsurance reserve

11. Having charged against a company the reinsurance reserve, as above determined, for fire, inland and marine insurance, and adding thereto all other debts and claims against the company, he shall, in case he finds the capital stock of the company impaired to the extent of ten per cent., give notice to the company to make good its whole capital stock within sixty days; and if this is not done, he shall require the company to cease to do business within this State, and shall thereupon, in case the company is organized under the authority of this State, immediately institute legal proceedings, as required in this act, to determine what further shall be done in the case. Any company receiving the aforesaid notice of the commissioner to make good its whole capital stock within sixty days, shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amount fixed by the charter of said company; and in case any stockholder of such company

shall neglect or refuse to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as the said commissioner shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholder may be entitled to, in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company; the value of such shares, for which new certificates shall be issued, to be ascertained under the direction of the said commissioner, and the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to any amount sufficient to make up the original capital of the company.

Whenever the capital stock of any joint stock, fire or marine insurance company of this State becomes impaired, the commissioner may, in his discretion, permit the said company to reduce its capital stock and the par value of its shares in proportion to the extent of impairment. Provided that, in fixing such reduced capital, no sum exceeding twenty-five thousand dollars shall be deducted from the assets and property on hand, which shall be retained as surplus assets; and provided, that no part of such assets and property shall be distributed to the stockholders; and provided, further, that the capital stock shall not be reduced to an amount less than that required by law for the organization of a new company. To examine, or cause to be examined, every detail of the business of any company transacting business of insurance within this State, whenever in his judgment such examination is required by the interests of the policy holders of such company.

12. It shall be the duty of the insurance commissioner, after he has notified a life insurance company, organized under authority of this State, to cease doing new business until the net value of its policies in force is equal to that called for by the standard of safety established by the State, at once to cause a rigid examination in regard to all the affairs of such company; in case it shall appear that there is no fraud or gross incompetency or recklessness shown to exist in the management, he may, upon publishing the facts in the case, permit such company to continue in charge of its business for one year, provided there is, in his opinion, reason to believe that the company may eventually be able to re-establish the legal net value of all its policies in force.

13. In case the insurance commissioner does not permit the company to continue in the control of its old business, it is hereby made his duty to institute the necessary proceedings for the protection of its policy holders, in accordance with the laws of this State.

14. To publish the result of his examination of the affairs of any company, whenever he deems it for the interest of the public so to do, in one or more papers of this State.

15. To suspend the entire business of any company in this State, and the business, within this State, of any other company, during its non-compliance with any provision of this act, or whenever its assets appear to him insufficient to justify its continuance in business, by suspending or revoking the certificate granted by him; and to give notice thereof to the insurance commissioner, or other similar officer of every State, and publish the same in the paper in which, by law, State notices are required to be published.

16. To institute, or cause to be instituted, the necessary proceedings, under the laws of this State, to close the affairs of any company of this State which shall appear to him upon examination to be insolvent or fraudulently conducted.

17. To report in detail, to the Attorney General, any violation of law relative to insurance companies, their officers or agents, or the business of insurance.

18. To furnish to the companies required by this act to report to him, the necessary blank forms for the statements required.

19. To preserve, in permanent form, a full record of his proceedings, and a concise statement of the condition of each company or agency visited or examined

20. At the request of any person, and on payment of the fee, to give certified copies of any record or papers in his office, when he deems it not prejudicial to public interests so to do, and to give such other certificates as this act provides for.

21. To report annually to the Legislature, on or before the 20th day of February, the receipts and expenses of his department for the year; his official acts; the condition of companies doing business in this State; and such other information as will exhibit the affairs of his department.

22. To send a copy of his annual report to the insurance commissioner, or other similar officer, of every other State, and to each company doing business in this State.

23. On request to communicate to the insurance commissioner of any other State in which the substantial provisions of this act

shall be enacted, any facts which by law it is his duty to ascertain respecting companies of this State doing business within such other State.

24. To adopt and to renew, from time to time, when necessary, with the approval of the Governor, a seal of office; an impression and description whereof, with the Governor's certificate of approval, shall be filed in the office of the Secretary of State.

25. It shall be his duty to see that no company shall be hereafter permitted to issue policies of insurance on lives in this State, that does a fire, marine, or inland insurance business. And, in determining the capital or assets of any fire insurance company, the commissioner shall exclude all notes given for premiums upon policies issued.

SECTION 4. The insurance commissioner, for the purposes of examinations authorized by law, has power, either in person or by one or more examiners, by him commissioned in writing:

1. To require free access to all books and papers within this State, of any insurance company, or the agents thereof, doing business within this State.

2. To summon and examine any person being within this State, under oath, which he or any examiner may administer, relative to the affairs and condition of any company.

3. For probable cause, to visit, at its principal office, wherever it may be, any insurance company not of a State in which the provisions of law contained in this act shall be in force, and doing business in this State, for the purpose of investigating its affairs and condition; and to revoke its certificate in this State, if it does not permit an examination.

4. To revoke or modify any certificate of authority, when any conditions prescribed by law for granting it no longer exist.

5. The insurance commissioner has also power to institute suits and prosecutions, either by the Attorney General, or such other attorney as the commissioner may designate, for any violation of this act; and the commissioner is a necessary party to any proceeding instituted for the purpose of closing up the affairs of any company, when the same shall not be in the name of the State.

§ 5. Whoever, without justifiable cause, being within this State, refuses to appear and testify before the commissioner, when so required, or obstructs him in the discharge of his duty, shall, for each offense be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year.

§ 6. Every instrument executed by the commissioner of this State,

or any other State in which the substantial provisions of this act shall be enacted, pursuant to authority conferred by this act and authenticated by his seal of office, shall be received as evidence in this State; and copies of papers in his office certified by him and so authenticated, shall be received as evidence in this State, with the same effect as the originals.

Every such instrument so executed and authenticated by the commissioner of this State, shall be recorded in the same manner, and the same and its record shall have the like effect as if acknowledged or proved according to law.

The impression of the seal may be directly on paper with or without tenacious substance.

§ 7. There shall be paid by every company to whom this act applies, the following fees toward defraying the expenses of executing its provisions:

Upon filing the declaration or certified copy of charter, twenty-five dollars.

Upon filing the annual statement or certificate in lieu thereof, twenty dollars.

For each certificate of authority and certified copy thereof, one dollar.

For every copy of any paper filed with the commissioner, the sum of twenty cents per folio; and for affixing the official seal to such copy, and certifying the same, one dollar.

For valuing policies of life insurance companies, ten dollars per million of insurance, or any fraction thereof.

For official examinations of companies *under this act*, the actual expenses incurred.

For countersigning and registering policies and annuity bonds, the reasonable expenses of custody, registration and issues.

All fees or fines received or collected by the commissioner under the provisions of this act, shall be paid over to the State Treasurer, accompanied with a statement in detail on the last week day of every month.

§ 8. In case the necessary expenses of said commissioner exceed the amount of fees collected under this act, and paid into the State treasury, (exclusive of the tax upon premiums), the excess of such expenses shall be annually assessed by the commissioner, in equal shares, upon all the insurance companies doing business in this State, and the commissioner has power to collect such assessments and pay the same into the State treasury.

§ 9. No transfer by the insurance commissioner of securities

of any kind, in any way held by him in his official capacity, is valid until countersigned by the Treasurer of the State.

It is the duty of the State Treasurer :

1. To countersign any such transfer presented to him by the commissioner, when satisfied of the propriety thereof.

2. To keep a record of all such transfers, stating the name of the company from whose account the transfer is made ; the name of the transferee, unless transferred in blank ; and a description of the security ;

3. Upon countersigning, to advise by mail the company concerned of the particulars of the transaction ;

4. In his annual report to the legislature, to state the amount of transfers countersigned by him.

§ 10. For the purpose of verifying the correctness of records, the commissioner is entitled to free access to the treasurer's record required by section 9, and the treasurer is entitled to free access to the books and other documents of the insurance commissioner, relating to securities held by the commissioner.

TITLE III.

PROVISIONS APPLICABLE TO ALL CLASSES OF COMPANIES.

SECTION 1. It is unlawful for insurers or their agents to make, negotiate, or solicit within this State, any contract of insurance, except as authorized in this act.

§ 2. No company hereafter organized in this State shall risk insurance upon the lives of individuals, nor grant, purchase, or dispose of annuities unless organized solely therefor, and doing such business exclusively.

§ 3. No declaration of organization or charter of an insurance company formed under any general law of this State, and no alteration or amendment thereof, shall be operative until it has been submitted to the Attorney General for examination, and found by him to be in accordance with the provisions of this act, and of such general law, and not inconsistent with the constitution and laws of the United States and of this State ; and so certified by him, and delivered to the insurance commissioner.

§ 4. The capital stock and accumulations of any insurance company of this State, shall be invested in the bonds or treasury notes of the United States, or national bank stocks, or bonds of this State, or of any other State of the United States, or of any city, town or county of this State, or of any other State of the United States, having legal authority to issue the same, bearing interest, at their market value, or

in any interest or dividend paying stocks or bonds issued under the laws of this State at their known market value, or they may be invested or loaned on mortgages of unincumbered real estate in this or any other State of the United States, worth at least double the amount loaned thereon, exclusive of buildings; except when such buildings are insured and the policies duly assigned as additional security, or loaned on pledges of any of the securities named in this section; provided, always, that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty per cent. more than the sum loaned on them, and all such loans are subject to the power of the company to terminate the same in case of depreciation of the securities below the limit; and, provided, that in all investments made upon mortgage securities the evidence of the debt shall accompany the mortgage or deed of trust

No dividends shall be paid except from surplus in excess of the minimum capital stock required by law, reserve fund for reinsurance of policies, and other liabilities of the company.

But this section shall not be construed to affect the power of a company to make dividends not impairing its capital and its reserves.

§ 5. Before any insurance company of this State shall do any business, the insurance commissioner shall cause an examination to be made, either by himself or by a disinterested person appointed by him for that purpose, who shall certify, under oath, that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such company has been paid in in money, and invested in such securities as are required by section four of this title.

§ 6. Before any insurance company shall commence business in this State, the following conditions must be complied with:

1. It must be fully organized.

2. If it be a company not of this State, a copy of its charter, duly accepted, or its declaration of organization or deed of settlement, duly approved in section three, and duly certified by the insurance commissioner or other proper officer or its own State or nation, with his certificate that the company is entitled to assume risks and issue policies therein, together with the stipulation respecting service of process in this State, required by section 21 of this title, and a statement of the place where it is located, must be filed with the insurance commissioner of this State.

3. It must procure from the insurance commissioner of this State

a certificate that it has complied with the provisions of the law of this State applicable to it, and is entitled to assume risks and issue policies in this State.

§ 7. No person shall act as agent in this State for any company not of this State, in any matter whatever relating to risks, until the last section has been complied with on the part of the company, and he has received from the insurance commissioner a certificate of authority, stating that the foregoing requirements have been complied with, a record of which certificate shall be kept in the office of the commissioner. A renewal certificate must be procured and filed within sixty days from the 1st day of January in each year.

§ 8. Every insurance company or agent thereof doing business in this State shall, in all advertisements of such company or agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized, and in all advertisements and circulars in which the capital of the company so advertising is stated, the amount at risk on the preceding 31st day of December, shall be stated.

§ 9. It is unlawful for any insurance company of this State to purchase, hold, or convey real estate anywhere; and for any other insurance company to purchase, hold or convey real estate within this State, except for the purposes and in the manner and time following:

1. Such as shall be requisite for its accommodation in the transaction of its business; or,
2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for moneys due; or,
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,
4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

Real estate lawfully acquired as aforesaid, and not necessary for the accommodation of the company in the transaction of its business, shall be sold and disposed of within five years after its acquiring title to the same; unless the company procures a certificate from the insurance commissioner that the interests of the company will suffer materially by a forced sale thereof, and extending the time or the sale to a period fixed in said certificate. Any company of a State in which the provisions of law contained in

this act shall be in force, may purchase, hold and convey real estate within this State, or any other of the said States, for the purposes and in the time and manner above provided for.

§ 10. Every insurance company having deposited securities with the insurance commissioner, whether under this act or any other, must by its president, secretary, or attorney, examine the securities and compare them with the books of the commissioner, once or more in each calendar year, at such times, in ordinary business hours, as the company may direct, and if found correct, give the commissioner a written acknowledgement that the same, designating the kinds and the amounts, are in his custody at the date of the acknowledgment.

§ 11. If any insurance company doing business in this State shall violate any of the provision of this act, or shall, by means of any advertisement, circular, notice or statement, printed or written, published, posted or circulated through and by the agency of any officer, agent, or other person, or by any other means, falsely represent or hold out to the public that the capital stock of such company is greater than its actual amount, or that the accumulation of such company is greater than its actual cash or market value, every director, officer or agent of such company guilty of any wilful participation therein shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment in the discretion of the court; and if any such company, after any such false advertisement, posted or circulated, shall receive any money, note or obligation for the payment of money, from any person, as a consideration for any insurance made, or policy issued or to be issued by such company, such money, note or obligation, shall be deemed and taken to have been received without consideration, and the directors of such company, and any officer or agent receiving the same, shall be jointly and severally liable in a civil action for the repayment thereof, and shall also, in like manner, be liable to the person insured for the amount of the premium paid.

SEC. 12. Every insurance company doing business in this State must transmit to the insurance commissioner a statement of its condition and business for the year ending on the preceding 31st of December, which statement shall be rendered within sixty days thereafter, except that foreign companies shall transmit their statement of business other than that done in the United States, prior to

the following first day of July. Said statement must be published at least three times in some newspaper of general circulation printed and published at the capital of the State.

SEC. 13. The annual statements required by the last section must be in form, and state the particulars as follows :

First—The amount of the capital stock of the company actually paid in.

Second—The property or assets held by the company, specifying :

1. The value, as nearly as may be, of the real estate held by said company.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same are deposited.

3. The amount of cash in the hands of agents, and in course of transmission.

4. The amount of loans, secured by mortgages and bonds, constituting the first lien on real estate, on which there shall be less than one year's interest due or owing.

5. The amount of loans on which interest shall not have been paid within one year previous to such statement.

6. The amount due the company on which judgments have been obtained.

7. The amount of stocks of this State, of the United States, of any incorporated city of this State, and of any other bonds or stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock on the day of making statement.

8. The amount of stocks held thereby as collateral security for loans, with the amount loaned on each kind of stock, its par value and market value on day of making statement.

9. Amount of interest due and accrued not paid.

Third—The liabilities of such company, specifying :

1. The amount of losses due and yet unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses incurred during the year, including those claimed and not yet due, and including the probable amount of those reported to the company, upon which no action has been taken ; *Provided*, that all such losses incurred in the State of Minnesota shall be reported separately and apart from those incurred in any other State or country.

4. The amount of dividends declared and due, and remaining unpaid.

5. The amount of dividends, if any, declared but not yet due.
6. The amount of money borrowed, and security, if any, given for the payment thereof.
7. All other existing claims against the company.
8. The gross amount of risks taken during the past year.
9. The amount of risks taken in the State of Minnesota during the past year.
10. The whole amount of risks outstanding.
11. The amount of outstanding risks in the State of Minnesota.
12. The whole amount of unearned premiums on outstanding risks.
13. The amount of unearned premiums on outstanding risks in the State of Minnesota.

Fourth—The income of the company during the preceding year, specifying:

1. The whole amount of cash premiums received.
2. The amount of premiums received on policies issued in the State of Minnesota.
3. The whole amount of interest money received.
4. The amount of interest money received on loans in the State of Minnesota.
5. The whole amount of income received from other sources.

Fifth.—The expenditures during the preceding year, specifying:

1. The whole amount of losses paid during the past year, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement.
2. The amount of losses paid upon risks taken in the State of Minnesota, during the past year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement.
3. The amount of dividends paid during the past year.
4. The whole amount of salaries paid officers and agents of the company.
5. The amount of salaries paid officers and agents employed in the State of Minnesota.
6. The whole amount of commissions and fees paid officers and agents.
7. The amount of commissions and fees paid officers and agents employed in the State of Minnesota.

8. The whole amount of all and any other expenses not herein enumerated.

9. The amount of taxes paid, specifying separately and apart the amount paid in this State.

10. The amount of fees of all and every kind paid the treasurer of the State of Minnesota, specifying date, for what purpose, and amount.

Sixth—The number of agents and other officers employed in the State of Minnesota.

§ 14. The insurance commissioner may require, at any time, statements from any company doing business within this State, or any of its officers or agents, on such points as he deems necessary and proper, to elicit a full exhibit of its business and standing.

§ 15. The statements required under this act must be verified by the signature and oath of the president or vice president, with those of the secretary or actuary; or by those of a majority of the directors.

§ 16. No company having neglected to file a statement required from it, within the time and in the manner prescribed, shall do any new business, after a notification by the commissioner, while such neglect continues.

§ 17. Any company wilfully neglecting to make and transmit any statement required shall forfeit one hundred dollars for each day's neglect.

§ 18. Any company or person wilfully making a false statement in any report to the commissioner is liable to a penalty of \$500, which sum must be paid to the commissioner, in default of which the certificate of authority shall be revoked.

§ 19. The insurance commissioner has authority to prevent publication of any part of the statement made under this article, until his annual report to the legislature is made.

§ 20. Every receiver or other judicially appointed trustee of an insurance company of this State, must make the statements required under this article, and all the provisions of this article shall apply to such receivers or trustees.

§ 21. No insurance company not of this State, nor its agents, shall do business in this State, until it has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the insurance commissioner, shall have the same effect as if served personally on the company within this State.

Any such company may, at its option, explicitly designate in its stipulation its principal office or agency in this State, and in such case the stipulation may be that any legal process served on the insurance commissioner, and also on the person in charge of such office at the time when service is made, shall have the same effect as if served personally on the company; and if there be no person in charge, or if he keep himself concealed, or avoid service, such process may be served on him, or at such office, by publication, or posting or otherwise, in the manner which shall then be prescribed by the law of this State for substituted service; and that if such company should cease to maintain such an office in this State, so designated, such process may thereafter be served on the insurance commissioner alone.

§ 22. So long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified; except that a new one may be substituted so as to require or dispense with service at the office, or to change the designation of such office.

§ 23. Service of process, according to a stipulation under section 21, shall be sufficient personal service on the company.

A copy of such stipulation certified by the commissioner, and his certificate of revocation or modification of such stipulation, that a company has no office within this State duly designated by such stipulation, and that process has been duly served on him, or either of such facts, shall be sufficient evidence thereof.

§ 24. When process against or affecting an insurance company is served on the insurance commissioner, he must file the same, and forthwith mail a certified copy to the company at its home office, postage prepaid.

§ 25. The term "process" in this act includes any writ, summons, or order, whereby any action, suit or proceeding shall be commenced, on which shall be issued in or upon any action, suit or proceeding.

MISCELLANEOUS.

REPORTERS have often been so kind as to send us, with the decisions, head notes prepared by themselves, and better ones, probably than we could make, especially as we do not always have the record of the case. But there is an advantage in uniformity, and as in most cases we do not have such head notes furnished, but are under the necessity of preparing them ourselves, we have preferred always to do so. Besides, as prepared for the State Reports, the head notes often unite the character of a digest and syllabus. As we always give a separate digest, we endeavor to preserve the distinction between the two. For these reasons the syllabuses of cases reported in this journal, unless it is otherwise stated, are written by the editors. When head notes are prepared by the judge delivering the opinion, they will always be preserved in the report.

REPORT OF THE SUPERINTENDENT OF THE KANSAS INSURANCE DEPARTMENT.

The first annual report of Superintendent Webb was made in January last for the year 1871. It is a closely printed, well written pamphlet of about sixty pages. He states that he received his commission on the 20th of March, but that it was not until July last that statements were received from any companies, and that it was therefore impossible to make his report on or before the 1st of July, according to the provision of the law. He states that his action under the new law has been very severely criticised.

On receiving his commission he says he found that the State Auditor had issued certificates of authority "to a large number of companies to do business in the State for the year commencing March 1st, 1871." Learning that several insolvent and fraudulent companies had established themselves in the State, under the imperfections of the former law, he proceeded to enquire "whether licenses so issued by the auditor were valid, when issued, and if valid then whether they remained in force after the taking effect of the new act." It was claimed by the foreign companies that

those certificates were valid, and that by them they had acquired vested rights, and that a contract existed between themselves and the State, to which the provision of the constitution of the United States that "No State shall pass any law impairing the obligation of contracts" applied. The Superintendent held that as no company had fully complied with the provisions of the law, which were conditions precedent to a legal issue of the auditor's certificates the certificates were void, and that even if they were valid at the time they were issued, they were subject to modifications or revocation by subsequent legislation, and were so revoked by the act of the legislature, and he called upon the companies to comply with the new law. Of the 52 companies then in the State 23 complied and 10 immediately withdrew. The Travelers and The Railway Passengers afterwards withdrew, after a somewhat protracted correspondence with the department, which is published in the appendix. Three companies have continued to do business in the State without complying with the requirements of the law or the Superintendent's demands. One of these, the Hartford Insurance Company, proposed an "agreed case," which was tried before a district court of the State. The court declared the auditor's certificate void, and the company appealed to the Supreme Court.

The whole number of insurance companies not belonging in the State now authorized to do business in Kansas, is 15 life and 21 fire. The number of home companies is 1 life and 3 fire.

The Superintendent makes several important suggestions in regard to amendments of the insurance law of the State. Speaking of the necessity of governmental supervision, he says :

"If all insurance corporations were honest, and possessed and would maintain the means and ability to fully respond to all their contracts and obligations, no supervision would be required. But such is not the fact. When it is remembered, as it ought to be, that within the last twenty-five years nearly or quite five hundred insurance companies have been organized in the different States of this Union, issuing during the few years of their fitful lives, hundreds of thousands of "policies," and taking millions of dollars from the pockets of the people in payment for "premiums" on such policies, have then failed, leaving their contracts of insurance worthless, it will scarcely be contended that some system of supervision over all companies doing business in the State, having for its main purpose the fullest possible protection to the public, is not necessary."

The Superintendent is rather sharp upon that much abused, and

as he evidently seems to think, much abusive company, the "National Life Insurance Company," of Chicago. Among other things he seems to disagree with that company on the subject of investments. The old law required mortgages on first class improved real estate, and he holds that the same is required under the present law. He says :

"The section of the new law respecting investments by life companies omits the word "improved;" and all acts (and none other) which are inconsistent with the new law are repealed by it. The National furnished this Department with a list of its mortgage loans, and of its mortgages taken as security, and held (or which ought to be held) for the benefit of its policy holders. The whole amount so invested is \$98,291.66. Of this sum \$47,150 are loaned to Benjamin Lombard, President of the National, and \$20,000 to Fernando Jones, Vice President of the National, and the whole amount "secured" by mortgages on unimproved lots, in the little town having the significant name of *Lombard*, (a few acres of prairie land in the vicinity of Chicago.) The National insists that this Department shall accept these mortgages as sufficient "security" for the investment of a sacred fund, holding that the old law is repealed, as being "inconsistent" with the new. The new act does not purport to be an amendment of the old, and there is no direct repeal; and the Superintendent does not regard the two sections as inconsistent or repugnant."

He does not seem to have a very high respect for co-operatives.

CASES REPORTED.

A full report of four cases is given this month.

The decision in *Schultz vs. The Pacific Ins. Co.* rendered in the Supreme Court of Florida, is of unusual interest on account of the number and character of the points raised, and the fullness and ability with which they are treated. The action was instituted to recover the sum of \$6,000, with interest, on a valued policy, upon the freight of the North German barque, "Mutter Schultz," on a voyage from Pensacola to England. The policy was issued to the plaintiff, who was master and two-thirds owner, and covers by express terms the interest of all concerned. The defenses were, first, that the vessel at the time of the sailing was not seaworthy; second, that at the time of procuring the insurance the plaintiff concealed certain material facts in relation to the condition of the vessel; third, that the loss of the vessel was occasioned by the gross negligence and want of skill with which she was navigated by the plaintiff; fourth, that the vessel was designedly cast away, or run on shore by the plaintiff; fifth, that the plaintiff was not entitled to recover the full amount stated in the policy, but only the difference between that amount and the sum

advanced by the charterer to the plaintiff before the vessel sailed. The jury in the court below found for the plaintiff, and the judgment of that court is affirmed. We cannot attempt to notice here the points decided in the opinion, but will refer to the syllabus of the case and to the digest, which is given in the present number.

The decision in *Lungstrass vs. The German Ins. Co.*, was rendered in the Supreme Court of Missouri. The plaintiff, who was agent of the company, received, on his application, a policy upon his own goods, and made an entry, in his accounts with the company, charging himself with the premium. On the next day the goods were burned. The defense was, on the part of the company, that no contract existed. The court held that any appropriate act, which accepts the terms as they were intended to be accepted so as to bind the acceptor, as clearly evidences the concurrence of the parties as a formal letter of acceptance, and that the entry made by the plaintiff was such an act.

The case of *Fayles vs. The National Ins. Co.*, decided in the same court, was an action upon a bill of exchange drawn by the agent of the company. The court held that where the by-laws gave the agent authority to compromise and settle claims, and he was in the habit of adjusting and settling claims, and of drawing drafts on the company which were honored, the community had a right to presume that authority had been delegated to him for that purpose, and the judgment of the court below, in favor of the plaintiff, was affirmed.

Lemon vs. The Phoenix Mut. Life Ins. Co., was decided in the Supreme Court of Appeals of Connecticut. The assured took out a policy upon his own life payable to the plaintiff, with whom he was under an engagement of marriage. He afterwards surrendered this policy to the company without her consent, and took out another for the same amount, payable to his brother, paying the premium. After his death, suit was brought by the plaintiff to recover the amount of the policy. The court held that a sum equal to the premium should be paid to the brother, and the balance to the plaintiff.

INSURANCE LEGISLATION.

Illinois.—The third section of the act, which is published in this number, states that the recent conflagration in Chicago, having deprived the people of the State of the means of ample insurance, an emergency exists requiring the act to take immediate effect. The act provides that if any fire, or fire and marine insurance com-

pany, organized under the laws of any foreign government, shall file with the Auditor a certificate of the Insurance Superintendent of any other State that the company has deposited in that State \$200,000 for the protection of its policy holders in the United States, the company shall not be required to make such deposit in the State. Such companies, if making a deposit in the State, are allowed to deposit the bonds, stocks or other securities of the country in which they are organized, at not more than their par nor more than their market value.

Missouri.—This act requires the Superintendent of the Insurance Department forthwith to deposit in a strong iron box, which shall require two distinct and different keys, &c., the securities received from any insurance company. The box is to be kept in the vaults of the "Safe Deposit Company of Saint Louis," and the insurance Companies are to pay the usual fees for the safe keeping of their respective boxes. The "Safe Deposit Company of Saint Louis," is the party to be benefitted by this act.

Minnesota.—This act is intended to be a full and comprehensive law for the regulation of insurance business in the State. In its general character it is similar to the laws of those States which have legislated most fully upon this subject. It makes it unlawful for any company or person to enter into any contract of insurance, or to do any kind of insurance business, in the State, except under certain regulations and restrictions.

INSURANCE COMMISSIONER.—For the purpose of securing the observance and enforcement of the law, and of investigating the character and condition of insurance companies, and informing the public in regard to the same, an Insurance Department is created and placed in charge of a Commissioner. This Insurance Commissioner is to be appointed by the Governor, with the advice and consent of the Senate, for a term of two years, with a salary of \$1,500 per annum. His fees are to be: For filing certificate copy of charter, \$25.00; for filing annual statement, \$20.00; for valuing life policies, \$10.00 per million of insurance. These fees are to go into the State Treasury, and in case the expense of the department exceeds the amount thus paid in, a sum equal to the excess is to be assessed upon the insurance companies doing business in the State. The Commissioner has ample power at any time to make a thorough examination into the affairs of any insurance company, and to take away its right to do business, and in case any company belonging in the State becomes unsound and unsafe, to institute legal proceedings and wind up its affairs. He is required

annually to make a report to the Legislature of his acts and of the condition of insurance companies doing business in the State.

The restrictions upon companies relate to the manner of organizing companies hereafter formed in the State; the kinds of business to which companies shall be confined; the amount of risks to be taken; the amount of capital required; the manner of investing the capital and assets; the securities to be deposited with the Commissioner, and the conditions upon which companies from abroad shall be permitted to do business in the State.

PROVISIONS APPLICABLE TO ALL INSURANCE COMPANIES.—Each company doing business in the State, whether belonging in the State or from abroad, is required to have a certificate of authority from the Commissioner, and to make regular annual statements of its condition and business according to explicit directions given in the act, and to submit to an examination by the Commissioner, whenever he may think proper to make one. The charter of every company hereafter organized in the State, must be submitted to the Attorney General and an examination must be made of the capital stock of the company by the Commissioner before it can do business. The capital stock and accumulations of every such company must be invested "in the bonds or treasury notes of the United States or national bank stocks, or bonds of this State or any other State of the United States, or of any city, town or county of this State, or of any other State of the United States," or they may be loaned on mortgages of unincumbered real estate in any State of the United States. Any company from out the State must file a certified copy of its charter and a stipulation that any legal process affecting the company, served on the Commissioner shall have the same effect as if served on the company.

LIFE COMPANIES.—No company is to engage in life insurance unless it is confined to that branch exclusively. No life company is hereafter to be organized in the State with less than \$100,000 capital; nor shall it do business until it has deposited \$100,000 in United States or Minnesota bonds with the commissioner. Companies from other States are required to make a like deposit, or to file a certificate that they have made the deposit in another State. Life companies doing business exclusively on the mutual plan are not required to make a deposit. Any company organized in the State may deposit funds with the commissioner for the benefit of registered policyholders. The commissioner is to make an annual valuation of the policies of all companies doing business in the State, but companies from other States may furnish certificates of valuation in the State to

which they belong. Any company organized under a law of Congress may elect one State, in which its policies may be valued, and furnish a certificate of valuation from that State. The calculations in the valuations are to be based upon the American Experience Table of Mortality and six per cent. interest. In case the assets of the company fall below the net value of all its policies in force, exclusive of capital stock, the commissioner is to proceed against the company and suspend its business.

FIRE COMPANIES.—No joint stock fire insurance company shall hereafter be organized in the State with less than \$200,000 capital; nor shall such company make any dividend except from the surplus profits of its business, and no such company doing business in the State, whether belonging in the State or not, shall expose itself on one risk for an amount exceeding five per cent. of its paid up capital. Every foreign fire company is required to deposit with the commissioner \$200,000, or file a certificate that such sum is deposited in another State for the benefit of policy-holders in the United States. A provision is made by which a company may retire its stock and do business as a mutual company, but no mutual fire insurance company, not organized in the State, shall do business in the State.

MARINE COMPANIES.—No joint stock marine company is to be organized in the State, unless it has a paid up capital of at least \$500,000. Foreign companies are required to deposit \$400,000, or to file a certificate that that amount is deposited in some other State. Marine companies, from other States, are not required to make a deposit if one is made in their own State.

FIRE AND MARINE COMPANIES.—No fire and marine insurance company shall do business in the State unless it has a capital of at least \$300,000. In case the capital stock of any such company becomes impaired ten per cent. upon a basis of calculation specified in the act, the commissioner is to give the company sixty days' notice to make up its stock, failing to do which he is to proceed against the company. The capital stock of such company organized in the State may, in certain cases, be reduced. In estimating the capital or assets of any company all premium notes are to be excluded.

This law is well drawn and systematically arranged, and the language is clear and concise. In the main it seems to be wise and just. We doubt not that it will prove to be one of the most useful laws ever adopted in the State. Its provision in regard to the investment of the assets of insurance companies is weak. The salary of the commissioner, which is "to cover clerk hire, office rent, stationery, etc.," will hardly secure a competent man, unless such men are more

abundant and to be procured at less price in Minnesota than in most other States, and his bond will hardly cover any large amount of dishonesty. The law is liberal towards companies outside the State, providing that the tax upon companies belonging to the State, and from abroad, shall be the same, namely: two per cent. on all premium receipts, which shall be in lieu of all other taxes and licenses, except the fees and expenses to be paid the department. One good feature in this act is the severe penalties provided in case the commissioner shall "directly or indirectly receive any compensation or pay for any services, or extra services, or for any neglect or omission of service," or in case any agent, officer, or trustee of any company shall, by means of any advertisement or notice, hold out to the public that the capital or assets of the company are greater than they really are; or in case any agent or employee of any company shall embezzle, or convert to his own use, any money received for the company. This part of the law might wisely be adopted in other States.

This act will occupy about twenty-five pages of the JOURNAL. We give the larger part of it this month. The remainder will appear in the next number.

BOOKS RECEIVED.

CINCINNATI SUPREME COURT REPORTER, Vol. 1, Number 12 and 13. Edited by Chas. P. Taft & Bellamy Storer, Jr., of the Cincinnati Bar. Robert Clark & Co., Cincinnati, 1871.

E. L. and W. S. Gross will accept our thanks for a copy of the Insurance Laws of Illinois, being chapter 55a of Gross Statutes of Illinois, bound in pamphlet form.

FOREIGN INSURANCE.—The following is the syllabus of the opinion delivered in case of The Eureka Insurance Company vs. Parks et al, reported in Nos. 12 and 13, Vol. 1 Cincinnati Supreme Court Reporter:

The defendants resided at Aurora, Indiana, and were shipping a quantity of hay to New Orleans in barges. Hays, who also resided at Aurora, sent up to the office of the plaintiff at Cincinnati, an application for insurance on the hay. The policy was issued, and the suit is for the premium. Hayes received a commission from the plaintiff. The defendants set up as a defense the statute of Indiana that a foreign insurance company should not enforce any contract made by an agent in Indiana; and also the act of Indiana, that it shall not be lawful for any agent of a foreign insur-

ance company to take risks, or transact any business of insurance in said State, without first producing a certificate of authority from the auditor of said State.

Held, that the insurance was not to be considered as transacted in Indiana, but in the State of Ohio where the suit is brought, and is not affected by the law of Indiana against agents of foreign insurance companies. Nor would it be affected in the courts of Ohio even though the law of Indiana should prevent its enforcement in that State.

TRANSFER OF TITLE.—We take the following syllabus of an opinion in the case of *Bates vs. Commercial, etc., Insurance Companies*, rendered by Judge Taft in the Supreme Court of Cincinnati, from the 11 and 12 Nos. of Vol. 1 of the Cincinnati Superior Court Reporter :

Bates sold the Louisville Theater to Fuller, retaining a lien by the deed for \$26,000 of the purchase money, and providing that Fuller should keep on the property insurance in \$10,000, loss, if any payable to Bates, on which policies Bates brings suit. Before the fire, Fuller sold and conveyed the property for \$75,000 to Mark Munday, retaining by the deed a lien for \$50,000, with the condition that Munday should keep the property insured in \$10,000, loss, if any, payable to Fuller.

Held, That the interests of a mortgagee and mortgagor are entirely distinct, and that the insurance procured by Munday under his arrangement with Fuller, did not avoid the policies for \$10,000, procured by Fuller under the arrangement with Bates, notwithstanding the provisions in said policies that "in case the insured or assigns should make other insurance without consent of the defendants," the policies should be void.

That the word "assigns" in this clause means assignees of the policy and not assignees of the property.

That the sale of Munday by Fuller, he retaining a lien for \$50,000 of the purchase money, did not avoid the policy issued by one of the defendants to Fuller, which contained the clause that "a transfer or change of interest of the insured, either by sale or otherwise, without consent of the defendant" should avoid the policy. The interest was not "transferred or changed" within the meaning of that clause in the policy.

THE MISSOURI LEGISLATURE.—The Missouri legislature has just adjourned, having passed two acts affecting insurance ; one providing

for the deposit of securities by the superintendent in the Safe Deposit Company of St. Louis, and the other allowing mutual insurance companies to increase their capital stock. Neither are acts of much importance. A very strenuous endeavor was made to divide the Insurance Department and create a new and separate office of Commissioner of the Life Department. The real object of the bill was to make a place for some politician, and no scruples were shown in the means used to secure its passage. The amendments passed by the House at last session were stolen, and the bill purporting to be in the same form in which it passed the House, was printed for use in the Senate, but with very material changes, stealthily introduced, increasing the amount of salaries and fees, and giving opportunities for enormous frauds and abuses. It was very fortunate for the insurance companies and the public that it was defeated. Its passage, which would have been sure but for the influence and efforts of those representing the insurance interests at the legislature, would have been the means of extorting tens of thousands of dollars from the companies, to be paid at last by the policy-holders. Any change in the insurance department of that State is needless. The different branches of insurance can be much more efficiently supervised by one Superintendent than by two and with far less expense, and every one has the highest confidence in the integrity and ability of Superintendent King.

ADMISSION OF ATTORNEYS.—The Supreme Court of Illinois, at the last term, made a new rule in relation to the admission of attorneys coming from other States, which is number eighty-six of the series. It is as follows: *Ordered*, That any application for admission to the bar, based upon a license granted in another State, must be made in term time by motion of some attorney of this court, made in open court; and no applicant will be admitted upon such license without examination, except it appear to the court, by affidavit or otherwise, that in the State in which the license was issued, a course of study was required at least equal to that prescribed in this State by Rule 85, or the applicant has been engaged in active practice for a period of two years, under such license.

RESTORATION OF COURT RECORDS.

The following is the law passed by the Legislature of Illinois for the restoration of court records. It was approved by Gov. Palmer on the 19th of the present month, and took effect immediately.

AN ACT to provide for the restoration of court records which have been lost or destroyed.

Be it enacted by the people of the State of Illinois, represented in the General Assembly :

SECTION 1. That whenever the record of any judgment or decree or other proceeding of any judicial court of this State, or any part of the record of any judicial proceeding, shall have been, or shall hereafter be, lost or destroyed, any party or person interested therein may, on application, by petition in writing, under oath, to such court, and on showing to the satisfaction of such court that the same has been lost or destroyed without fault or neglect of the party or persons making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record, where the same can be obtained, which certified copy shall thereafter have the same effect as such original record would have had, in all respects.

SEC. 2. That whenever the loss or destruction of any such record, or part thereof, shall have happened, or shall hereafter happen, and such defect cannot be supplied as provided in the next preceding section, any party or person interested therein may make a written application to the court to which such record belonged, verified by affidavit or affidavits, showing the loss or destruction thereof, and that certified copies thereof cannot be obtained by the party or persons making such application, and the substance of the record so lost or destroyed, and that such loss or destruction occurred without the fault or neglect of the party or persons making such application, and that the loss or destruction of such record, unless supplied, will or may result in damage to the party or persons making such application, and thereupon said court shall cause said application to be entered of record in said court, and due notice of said application shall be given, as in chancery cases, that said application will be heard by said court, and if, upon such hearing, said court should be satisfied that the statements contained in said written application are true, said court shall make an order reciting what was the substance and effect of said lost or destroyed record; which order shall be entered of record in said court, and have the same effect which said original record would have had if the same had not been lost or destroyed, so far as concerns the party or persons making such application, and the persons who shall have been notified as provided for in this section. The record in all cases where the proceeding was *in rem*, and no personal service was had, may be supplied upon like notice, as nearly as may be, as in

the original proceeding. The court in which the application is pending may, in all cases in which publication is required, direct, by order or orders to be entered of record, the form of the notice, and designate the newspaper or newspapers in which the same shall be published.

SEC. 3. In case of the destruction by fire, or otherwise, of the records, or any part thereof, of any county court having probate jurisdiction, the judge of any such court may proceed, upon his own motion, or upon application in writing of any party in interest, to restore the records, papers and proceedings of his court relating to the estate of deceased persons, including recorded wills, and wills probated or filed for probate in said court; and for the purpose of restoring said record, wills, papers, or proceedings, or any part thereof, may cause citations to be issued to any and all parties, to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record, or part thereof, and the production of any and all written documentary evidence which may be, by him, deemed necessary in determining the true import and effect of the original record, will, paper, or other document belonging to the files of said court, and may make such orders and decrees establishing said original record, will, paper, document, or proceeding, or the substance thereof, as to him shall seem just and proper; and such judge may make all such rules and regulations governing the said proceedings for the restoration of the record, will, paper, document, and proceeding pertaining to said court, as in his judgment will best secure the rights and protect the interests of all parties concerned.

SEC. 4. That in all causes which have been removed, or shall hereafter be removed to the Supreme Court of this State, a duly certified copy of the record of such cause remaining in the said Supreme Court, may be filed in the court from which said cause was removed, on motion of any party, or person or persons, claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

SEC. 5. Whereas, by reason of the recent destruction by fire of the records of the courts of Cook county, a necessity exists for this act to take effect immediately; therefore, this act shall take effect and be in force from and after its passage.

Approved March 19th, 1872.

—*Chicago Legal News.*

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DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

APPLICATION.

§ 149. FIRE.—*Warranty—Burden of Proof.*—The policy contained a provision that it should be “subject to the conditions and stipulations endorsed on the back of the policy, which constitute the basis of this insurance.” One of the conditions and stipulations on the back of the policy was that “the basis of the contract is the application of the insured, and if such application does not truly describe the property, this policy shall be null and void.” The application contained the question, “What is the present cash value of the property on which insurance is wanted?” to which the insured replied, “The present cash value of the tobacco on hand is \$30,000, and will be increased to \$50,000; the average value on hand, say \$30,000.” *Held.*

- that insurance contracts are in general subject to the same rules of construction as other contracts, and it is a familiar rule that when there are several separate writings, all about the same matter, between the same parties, referring to each other, and all necessary to complete the whole, they are all to be read together as if they were all one," and that the application was a part of the contract. *Held*, also, that "the burden of proof is upon the plaintiff. It would be otherwise, if the application were not a part of the contract, but was a mere representation. Being a part of the contract, it was necessary for the plaintiff to set it out in his complaint, and it being in the nature of a warranty or condition precedent, it was necessary that the plaintiff should prove it."

*Bobbitt vs. The Liverpool and London and Globe Ins. Co.**

Rep'd Jour'l p. 596.

N. C. S. C.

AGENCY.

§ 150. LIFE.—*Premium—Effect of War on.*—The Company, a corporation created by the State of New York, appointed one McCoy its agent in Alabama, and prior to the war issued a policy through him to Goodman, a resident and citizen of Alabama. *Held*, that the agency "having been created before the war, it would not have been revoked by the war, at least so far as the right to receive payments of annual premiums was concerned. Payment of the premiums by Goodman to the agent would not have violated any law of war or any duty of Goodman."

Ward vs. Smith, 7 Wallace 447, 453, Conn. vs. Penn. 1 Peters C. C. R. 496, 524, 525; *United States vs. Grossmeyer*, 9 Wallace 72, 75.

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.†

Rep'd Jour'l p. 572.

U. S. C. C. S. Dist. N. Y.

§ 151. LIFE.—*Obligation to Continue.*—The defendants, a corporation created by the State of New York, issued in 1858 a policy, through the hands of their agent at Mobile,

• Decision rendered May 1st, 1871. To appear in 44 N. Y.

† Decision rendered December 22d, 1871.

to Goodman, a resident of Mobile and a citizen of Alabama. In 1861, the President of the United States, by proclamation, declared the inhabitants of Alabama to be in a state of insurrection, and all commercial intercourse between them and the inhabitants of other States unlawful. Goodman paid no premiums after that date during the war. *Held*, that "the defendants were bound to keep in Alabama an agent to whom Goodman could pay his annual premiums, or could at least offer or tender payment, such agent to be appointed in conformity with such statute law [of Alabama as should be enacted on the subject of their keeping agents in the State]; and that, if the absence of such agent was all that prevented the payment of such premiums by Goodman, the defendants are estopped from setting up the non-payment of such premiums, at the times stipulated therefor, as a defense to this suit."

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

AGENT.

§ 152. FIRE.—*Bill of Exchange by.*—The by-laws of the Company gave the general agent the appointment, removal, and general direction of the local agents, and the general supervision of the agency department, with power, under the direction of the executive committee, to compromise and settle claims arising from loss and damage. The agent drew a bill of exchange in the name of the Company, in favor of the insured, in payment of a loss he had suffered, which bill was assigned and transferred to the plaintiff. On the trial in the court below, the plaintiff offered evidence to show that the agent had drawn similar bills in like cases, which were paid by the Company. *Held*, that "If an officer of a corporation openly exercises a power, which pre-supposes delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed," and that

“when the by-laws gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and when it was seen that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the Company for the same, and that these drafts were honored and paid off, the community and those who dealt with him, had a right to presume that authority had been delegated to him for that purpose,” and that the evidence was clearly admissible, and that the judgment for the plaintiff must therefore be affirmed.

*Fayles vs. National Ins. Co.**

Rep'd Jour'l p. 528.

Mo. S. C.

INSURABLE INTEREST.

§ 153. FIRE.—*Bailee*.—The plaintiff's bailee took out a policy in his own name for the plaintiff's benefit, whose name did not appear in the policy. The bailee afterwards assigned the policy to the plaintiff. *Held*, that the plaintiff had an insurable interest.

Bobbitt vs. The Liverpool and London and Globe Ins. Co.

— § 149.

LEGISLATION.

§ 154. LIFE.—*Right of State to Legislate*.—The defendants were a corporation created by the State of New York and doing business in the State of Alabama, which State had passed a law relating to life insurance companies not incorporated by the laws of that State. *Held*, that “that State had a right to impose such terms and conditions as it chose, in granting its assent to the recognition of the defendants in Alabama, and of their rights under policies to be issued in Alabama to citizens and residents of Alabama, and to exact, in its discretion, such security as it thought proper for the performance of the contracts of the defendants under such policies. It also had a like right to

* Decision rendered February 26th, 1872. To appear in 49 Mo.

regulate the business of agencies of the defendants in Alabama, with regard to future payments to become due on existing policies issued in Alabama to citizens and residents of Alabama."

Paul vs Virginia, 8 Wallace, 168, 181.

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

POLICY.

§ 155. *LIFE.—Assignment of, by Gift—Premium.* The assured took out a policy upon his life for his own benefit. Afterwards he surrendered this policy and took out another in its place, made payable to the plaintiff, with whom he was under an engagement of marriage, informing her of what he had done, and at her suggestion placed it in the hands of her brother. The assured afterwards gained possession of this policy without the plaintiff's consent, and without her knowledge caused it to be surrendered, and a new one, on which he paid the premium, to be issued in its place payable to his brother. At the time the policy was issued to the plaintiff and afterwards until his death, his health was such that it prevented him from passing an examination for a new policy. *Held*, that a person can obtain an insurance on his own life, payable in case of his death to a third party, and that the delivery of the policy to the party as a gift will be effectual.

Rants vs. American Life Ins. Co., 27 N. Y., 282.

Held, also, that there was an executed gift to the plaintiff of the second policy, and that she was equitably entitled to the benefit of the last policy. *Held*, also, that the assured was interested in the last policy to the extent of the premium paid at the time it was taken out, and that the amount of that premium should be deducted from the amount due on the policy and the balance paid to the plaintiff.

Lemon vs. Phoenix Life Ins. Co.

Rep'd Jour'l p. 520.

Conn. S. C. E.

*Decision rendered February —, 1872. To appear in 33 Conn.

§ 156. LIFE.—*Locality and Entirety of Contract.*—The defendants, a corporation created by the State of New York, delivered a policy, through their agent at Mobile, bearing his signature as such agent, and upon an application made through him, to the assured, who resided at Mobile,—*Held*, that “the policy in question was in fact issued in Alabama, by the defendants, to a citizen and resident of Alabama, although it professes to have been delivered as well as signed by the president and secretary of the company”; and *Held*, that the receipt, by the agent, of the renewal premium paid at Mobile March 2, 1861, made the contract, as respects the period to elapse before March 2, 1862, an Alabama contract to be governed by the statute law of Alabama. *Held*, also, that “it is not to be conceded that, under the policy in this case, the acceptance of a renewal premium would have been a new insurance.”

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150

§ 157. FIRE.—*Notice of Acceptance.*—The plaintiff was agent for the company, and was to make his returns monthly. The secretary of the company, upon his application, sent him a policy upon his own goods, the premiums on which were to be credited and remitted like the others. The plaintiff, on the same day the policy was received, made an entry in his account with the company, giving credit for the premium and accepting the policy. On the next day, and before the time of making his monthly returns, his goods were burned. *Held*, that no contract can arise from a proposition or offer on one side until it is accepted on the other, and that this acceptance must be evidenced by some act that binds the party accepting. “Express notice of acceptance can only be dispensed with, when apparently not contemplated, and some other act of acceptance is equally clear and unequivocal.” “The usual mode of accepting a proposition made by correspondence, is by notice of acceptance; and though it was formerly held that it did not ripen into a contract until receipt of the notice, yet the doctrine now is that the contract is com-

plete when the acceptance is forwarded, without reference to the time of its reception."

Kentucky M. Ins. Co. *vs.* Jenks, 5 Ind. 96; Halleck *vs.* Connecticut Ins. Co., 21 Dutcher, 280; Taylor *vs.* Mut. F. Ins. Co., 9 How. 390.

Held, also, that "notice is not the only evidence of acceptance. Any appropriate act, which accepts the terms, as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties—the bringing their minds together—as a formal letter of acceptance. The terms, the nature of the offer, or circumstances under which it is made, or relation of the parties, may indicate another mode; and if so, its adoption equally binds them." *Held*, also, that the entry made by the plaintiff giving credit for the premium, "unequivocally shows that he intended to abide by the policy as last received, and he thereby became bound by its terms."

*Lungstrass vs. German Ins. Co.**

Rep'd Jour'l p. 524.

Mo. S. C

PRACTICE.

§ 158. FIRE. — *Question for Jury — Description of Property.*—The building was described in the policy as a three or four story brick distillery building and machinery, situated entirely detached. The application contained the same description, substantially, with the addition that the "gable end is frame." The defense in the court below was, a breach of warranty in the description, in that the building was not of brick, but the third story and a portion of the building one story high, and the boiler shed, were of wood; and also fraud in not disclosing the entire description of the premises, as they really existed. The proof conduced to show that the agent of the insured stated, at the time of making the application, that he did not know that the description he gave was correct, but that he would send plats that the description might be made perfect, and that plats were afterwards

* Decision rendered July —, 1871. To appear in 48 Mo.

left with the agent. Instructions were asked by the parties presenting the issue whether there was a misrepresentation of any material fact, or a breach of warranty. The court refused all instructions, and gave an instruction to the effect that the plaintiff could not recover. *Held*, that the court erred in withdrawing the case from the jury by the instruction given. The facts given in evidence by plaintiff if true, made out a *prima facie* case, and the jury ought to have been suffered to pass upon them. And *Held*, that "if the matter was left open as indicated till the maps were delivered or produced, then the material facts, not disclosed in the application and policy, as written out, were furnished, and the agent of the defendant might have returned the premium and withdrawn the policy."

*Woods, Assignee, vs. The Atlantic Ins. Co.**

Rep'd Jour'l, p. 603.

Mo. S. C.

PREMIUMS.

§ 159. LIFE. — *Withdrawal of Agency — War.* — The defendants, an insurance company created by the State of New York, issued a policy through McCoy, their agent in Alabama, to Goodman, a resident and citizen of Alabama. Afterwards, in 1861, the Company, on account of the war, withdrew all its agencies from the State and the assured paid no premiums during the war. *Held*, that, "if the defendants were entitled to the punctual payment of the premiums, as a condition precedent to their continuing liability from year to year, their prevention of such payment by the withdrawal of McCoy's agency and all other agencies in Alabama, excused Goodman from making the payments punctually and debars the defendants from setting up such want of punctuality as a defense in this suit."

Williams vs. Bank of the United States, 2 Peters 94, 102; *Van Buren vs. Digges*, 11 Howard 461, 479.

And that, "the defendants must be regarded as having prevented Goodman from paying his premium as due in

* Decision rendered April 22d, 1872. To appear in 49 Mo.

Alabama, where he had a right by the contract to pay them, and, therefore, as having waived such punctual payment; that the policy was not and is not forfeited by reason of the non-payment of premiums." *Held*, also, that "the withdrawal of the agency of McCoy and of the other agencies in Alabama, made it unnecessary for Goodman to seek out McCoy or some other person, who had been an agent of the defendants in Alabama, and tender the premiums as due to him even though, as would appear from the evidence, McCoy remained in Alabama accessible during a part at least of the war."

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

§ 160. *LIFE.—Waiver of Payment of.*—The Company, a corporation created by the State of New York, issued a policy to the assured, a resident and citizen of Alabama, in 1858. The assured was prevented by the war, during its continuance, from paying any premiums after the 2d of March, 1861. In 1866, before the coming around of any 2d of March, after the close of the war, he applied to the Company, at New York, requesting them to recognize the policy on terms to be arranged. They replied that they did not recognize the policy as valid, because it had been forfeited by non-payment of premiums, and refused to receive the premiums in arrear. *Held*, that "what thus transpired made it unnecessary for Goodman to tender the premiums due March 2d, 1866."

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

§ 161. *LIFE.—Effect of War on Payment of.*—The defendants, a corporation created by the State of New York, issued, prior to the war, a policy upon the life of Goodman, a resident and citizen of Alabama. The defendants claimed that it was unlawful for them during the war to receive any premiums on the policy. *Held*, that "their inability to receive the premiums when due, in

1862, 1863, 1864 and 1865, amounted to the same thing as if such premiums had been actually tendered and the defendants had refused to receive them. Such inability to receive was a dispensing, by the defendants, with the punctual payment of the premiums, and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk. Such inability was a default on the part of the defendants, preventing Goodman, a citizen and resident of Alabama, from paying the premiums to the defendants at New York, and therefore dispensing with the payment of them as performance by Goodman."

Hamilton, Ex'r. vs. The Mutual Life Ins. Co.

—§ 130.

REPRESENTATION.

§ 162. FIRE.—*Materiality of—Truthfulness of.*—The application contained the question "What is the present cash value of the property on which insurance is wanted?" to which the insured replied, "The present cash value of the tobacco on hand is \$30,000, and will be increased to \$50,000. The average value on hand say \$30,000." It was claimed in the court below that even if the description of the property was false it was immaterial and therefore did not interfere with the plaintiff's right to recover. *Held*, that "the doctrine of immateriality does not apply when the representation is a part of the contract, and especially when it is in reply to a direct question. 'Where the representation is no part of the contract, it vitiates the policy as being a fraud merely; and therefore if it be immaterial or be substantially complied with, it will not affect the validity of the policy.' But if the description of the property were not a part of the contract, but were a mere representation, still it is a great mistake to say that it is immaterial." *Held*, also, that it was sufficient to avoid the policy if the representations "were false,

however honestly made, because it was the representation of a fact, calculated to mislead, and not an expression of opinion or belief.”

Bobbitt vs. The Liverpool and London and Globe Ins. Co.

—§ 149.

RESIDENCE.

§ 163. LIFE.—The assured, in his application, was described as of Mobile, in the State of Alabama, and all the premiums were, with the knowledge of the Company, paid to its agent at Mobile. *Held*, that “in the absence of any notice to the contrary, the defendants must be held to have continued to understand that he continued to reside in Mobile.”

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

WAR.

§ 164. LIFE.—*Effect of, on Payment of Premiums.*—The defendants, a corporation created by the State of New York, issued, prior to the war, through its agent in Alabama, a policy to Goodman, a resident and citizen of Alabama. The defendants claimed that it was unlawful for them, during the war, to receive any premiums on the policy. *Held*, that “the unlawfulness of any receipt by the defendants at New York, from Goodman, or any other person in Alabama, during the war, of any moneys paid as premiums, cannot affect any rights of Goodman in respect of having the opportunity of paying such premiums in Alabama, or be set up by the defendants as a ground of forfeiture of the policy in respect of such rights.” *Held*, also, that “the contract was only suspended during the war. After the end of the war, the right of Goodman to pay the premiums, which he had been prevented from paying by the action of the defendants, continued in all respects as if the 2d of March, 1862 had not passed.”

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 150.

§ 165. LIFE.—*Effect of, upon Contracts.*—*Held*, that the principle on which rests the rule that war dissolves contracts of insurance made before the war, “does not extend to avoiding policies insuring property, which is exempted by the laws of war from liability to be seized by the government of the insurer’s country. While the rule would avoid a policy insuring the life of one, who should become an actual and active enemy of such government, it thus acquiring the right to destroy his life, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy, who should remain such in fact.”

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 159

§ 166. LIFE.—*Policy on Non-combatant Enemy.*—The company, a corporation organized under the laws of New York, issued a policy before the war upon the life of Goodman, a resident and citizen of Alabama. The evidence shows that the assured did not favor secession; that he did not bear arms against the United States; that he held no office during the war under any government, and that he pursued the occupations of civil life during the war. *Held*, that “on these facts it cannot be held that any rule of law requires that the policy on the life of Goodman should be regarded as having been dissolved and abrogated by the war.”

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 159

§ 167. LIFE.—*Effect of, upon Contracts.*—*Held*, that “Where a contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, the only effect of the war is to suspend its operation, and on the return of peace the rights of the parties under it may be enforced.”

Manhattan Life Ins. Co. vs. Warwick, 20 Grattan, 614; *Ins. Law Jour'l*, Vol. 1, 115.

Hamilton, Ex'r, vs. The Mutual Life Ins. Co.

—§ 159.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE STATE
SUPREME COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PETER HAMILTON, EXECUTOR of DUKE W. GOODMAN, <i>Plff.</i>	}
vs.	
THE MUTUAL LIFE INS. CO. OF NEW YORK, <i>Deft.*</i>	

The defendant, a corporation created by the State of New York, issued a policy to the assured, a citizen of Alabama, upon his life before the war, through its agent in that State. After the commencement of the war, the company withdrew its agency from the State, and the plaintiff paid no annual premium during war.

Where a contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, the only effect of the war is to suspend its operations, and on the return of peace the right of the parties under it may be enforced.

As regards the obligation of the insurer, the contract was not one at all of continuing performance, although it was a continuing contract.

It is not to be conceded that under the policy in this case the acceptance of a renewal premium would have been a new insurance.

The principle on which rests the rule that war dissolves contracts of insurance made before the war, does not extend to policies on property exempted by the laws of war from seizure by the government of the insurer's country.

While this rule would avoid a policy on the life of one, who should become an actual and active enemy of such government, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy.

The policy on the life of the assured cannot be regarded as having been dissolved and abrogated by the war.

Where the assured was described in the policy as residing at Mobile, and all the premiums were paid, with the knowledge of defendants, to their agents at that place, in the absence of notice to the contrary, the defendants must be held to have continued to understand that he continued to reside at Mobile.

* Decision rendered December 22d, 1871.

The defendants were bound to keep an agent in Alabama to whom the assured could pay his annual premium, and the defendants are estopped from setting up the non payment of such premiums at the times stipulated therefor as a defense to this suit.

The State of Alabama had a right to impose such conditions as it chose in recognizing the defendants in that State, and their rights under policies to be issued there, and to exact such security as it thought proper for the performance of the contracts of the defendants under such policies.

The policy in question was issued in Alabama by the defendants to a citizen and resident of Alabama, although it professes to have been delivered, as well as signed, by the president and secretary of the Company.

The receipt by the agent of the Company at Mobile, of the premium paid March 2d, 1861, made the contract, as respected the period to elapse before March 2d, 1862, an Alabama contract to be governed by the statute law of Alabama.

The agency created before the war would not have been revoked by the war, at least so far as the right to receive annual premiums was concerned.

And payment of the premiums by the assured to the agent would not have violated any law of war, or duty of the assured.

If the defendants were entitled to the punctual payment of the premiums as a condition precedent to their continuing liability from year to year, their prevention of such payment by the withdrawal of their agency from the State excused the assured from making the payments punctually, and debars the defendants from setting up such want of punctuality as a defense in this suit.

The unlawfulness of any receipt of premiums by the defendants at New York from the assured during the war, cannot affect his rights of having an opportunity to pay in Alabama, or be set up by the defendants as a ground of forfeiture of the policy.

The contract was only suspended during the war. After the end of the war the right of the assured to pay the premiums, which he had been prevented from paying by the action of the defendants continued, in all respects, as if the time for making the first payment had not passed.

The refusal of the Company before March 2d, 1866, to receive the payment of the premiums in arrear, made it unnecessary for the assured to tender the premium due on that day.

The withdrawal of the Company's agencies from Alabama, rendered it unnecessary for the assured to seek out a person, who had been an agent, and make a tender of the premiums as due to him, even though such person remained in the State.

The Company must be regarded as having prevented the assured from paying the premiums as due in Alabama, where he had a right by the contract to pay them, and, therefore, as having waived such punctual payment.

And the policy was not, and is not, forfeited by reason of the non-payment of premiums.

The inability of the Company to receive the premiums, when due, amounted to the same thing as if such premiums had been actually tendered and the Company had refused to receive them.

Such inability to receive was a dispensing, by the Company, with the punctual payment of the premiums and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk.

SANFORD & WOODRUFF, for *Complainant*.

JULIEN T. DAVIES, for *Defendant*.

BLATCHFORD, J.

The plaintiff is a citizen of Alabama, his testator was, during all the period covered by the transactions in this case, a citizen of Alabama, residing and domiciled therein, and the defendants are a corporation created by the State of New York.

The defendants, by their proper officers, made a written contract

with Duke W. Goodman, the plaintiff's testator, dated March 24th, 1858. The contract was what is commonly known as a policy of life insurance. It was signed by the officers of the corporation, and made in its name, and was not signed by Goodman, but was delivered to and accepted by him. The material provisions of the policy are these: "This policy of insurance witnesseth, that the Mutual Life Insurance Company of New York, in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and seventy-seven dollars and fifty cents to them in hand paid by Duke W. Goodman, and of the annual premium of one hundred and seventy-seven dollars and fifty cents, to be paid on or before the second day of March in every year during the continuance of this policy, do assure the life of the said Duke W. Goodman, of Mobile, in the county of Mobile, State of Alabama, in the amount of five thousand dollars, for the term of his natural life." There is then a stipulation on the part of the Company to pay the sum insured, to the assured, his executors, administrators or assigns, in sixty days after due notice and proof of interest (if assigned or held as security) and of the death of the assured. There is then a declaration that the policy is accepted by the assured on certain express conditions, that, in case the assured shall, without the consent of the Company previously obtained and endorsed on the policy, pass beyond certain specified limits, or visit certain specified parts of the United States, or be or reside in certain specified places, or do certain specified things, or die from certain specified causes, the policy shall be null, void and of no effect. Then follows this provision: "It is also understood and agreed, by the within assured, to be the true intent and meaning hereof, that * * * in case the said Duke W. Goodman shall not pay the said annual premium on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said Company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine; and it is further agreed by the within assured, that, in every case where this policy shall cease, or become or be null or void, all previous payments made thereon shall be forfeited to the said Company." At the foot of the policy, on its face, were these words, in print: "Agents of the Company are authorized to receive premiums when due, but not to make, alter or discharge contracts, or waive forfeitures." On the back of the policy were these words, in print: "Receipts heretofore by the Company of premiums after the day on which they fell due

were by the assured and the Company considered acts of grace or courtesy, and as forming no precedent in regard to future payments of premiums on the policy ; and all future receipts by the Company of premiums after due are viewed and understood by the parties in interest as acts of courtesy of the Company, and in no case to be considered a precedent, or a waiver of the forfeiture of the policy, according to the condition expressed therein, if any future payment of premiums be omitted on the day it falls due."

The defendants had, on the 2d of March, 1849, issued to the wife of the said Duke W. Goodman a policy for \$5,000 on the life of her husband, subject to the annual premium of \$177.50, on an application made February 28th, 1849, when Mr. Goodman was thirty-seven years of age. The defendants are organized on the mutual plan, and made, under their charter, a dividend on the 1st of February, 1853, whereby there was added to the policy in favor of Mrs. Goodman the sum of \$415.37, at that date, as a principal sum in which Mr. Goodman's life was insured, subject to all the terms of the policy, in addition to, and in like manner as, the \$5,000, but without any addition of premium to be paid. On the 1st of February, 1858, a like dividend was made, whereby the further sum of \$567.68 was added to the same policy, as a like principal sum. These dividends were sums of money representing excesses of premium paid by Mrs. Goodman beyond what was found to be necessary to be retained by the Company in respect of its risk on the policy, and were applied by the Company, on behalf of Mrs. Goodman, to the purchase for her of paid up insurances with the Company, on the same life, in the principal sums so added to the policy. But, although no increased premium beyond the \$177.50 was payable, in respect of these additions, or in respect of the policy by reason of these additions, such premium of \$177.50 was annually payable in respect of the whole policy, embracing the \$5,000 and the additions, the additions being placed upon the same footing with the \$5,000, in respect to all the stipulations of the policy, in like manner as if they had been part of a sum in which the life insured was insured at the inception of the policy, at the annual premium of \$177.50. These added sums were at the risk of the policy, with the \$5,000, and recoverable from and payable by the Company, at the death of Mr. Goodman, only if the \$5,000 was recoverable and payable. Under this state of facts the policy in favor of Mrs. Goodman was surrendered to the defendants, and they accepted the surrender, and in place of it, issued the policy of the 24th of March, 1858. It bore the same number as the

policy of March 2d, 1849, and appears to have been regarded as a continuation of it, with only the change as to the recipient of the sum insured, at the death of Duke W. Goodman, for the defendants transferred to it, and endorsed upon it, as sums insured by it, the said several sums of \$415.37 and \$567.68, which had been so added to the policy of 1849.

On the 2d of March in each of the years 1859, 1860 and 1861, Mr. Goodman paid to Thomas W. McCoy, the agent of the defendants at Mobile, the sum of \$177.50, as the annual premium mentioned in the policy. For the payments of 1859 and 1860 he was furnished, on each occasion, with a receipt, signed on behalf of the Company by its secretary, dated at the office of the Company in New York, and countersigned by McCoy, as agent. The receipt of 1859 specifies the sum paid as renewing the policy "from the 2d day of March, 1859, to the 2d day of March, 1860." The receipt of 1860 specifies the sum paid as renewing the policy "from the 2d day of March, 1860, to the 2d day of March, 1861." On the margin of each one of the receipts of 1859 and 1860 were these words, in print: "N. B. The agreement is mutual, (see application and policy) that, unless the premium is paid on or before the day it becomes due, the policy is forfeited and void." For the payment of 1861 Mr. Goodman received a receipt, signed by McCoy, as agent of the Company, and dated Mobile, March 2d, 1861, specifying the sum paid as the renewal premium on the policy "from date unto 2d day of March, 1862." The payment of March 2d, 1861, was remitted by McCoy to the defendants at New York, and was received by them there by March 26th, 1861. Afterwards, and on that day, the defendants, by their president, addressed a letter from New York to McCoy at Mobile, in which they said: "On full examination of the Alabama law of 24th February, 1860, we come to the conclusion that we cannot comply with its provisions, and therefore feel obliged to withdraw all our agencies from the State. We write to each policy-holder to remit premiums directly to us in future. Will you be kind enough to address them for us, as we cannot tell where the parties now live. Our assured are not covered against actual warfare of any description, whether it be by collision with the Northern States or any other power. This does not apply to non-combatants." McCoy was the principal agent of the company in Alabama. They had other agents in that State. After sending such letter of March 26th, 1861, the Company had no agent in Alabama until sometime in the year 1869. Mr. Goodman died at Mobile, June 6th, 1866. He had not

made any payment of the annual premium on the policy after the payment made March 2d, 1861.

Under these circumstances, the bill in this case is filed, setting forth, that on the 2d of March, 1862, and on every 2d of March thereafter, during his life-time, Mr. Goodman "was ready and willing to pay the several annual premiums, as the same respectively became payable," "but that he did not, on the 2d of March, 1862, pay said annual premiums, or any or either of them, because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead, and because the then existing insurrection and rebellion against the Government of the United States had interrupted and prevented all lawful intercourse, by mail or otherwise, between the city of Mobile, where the said Duke W. Goodman resided and then was, and the city of New York, where the said company resided and had its office and place of business;" that on the 16th of August, 1861, under the authority of the Act of Congress of July, 13th, 1861, the President of the United States, by proclamation, declared that the inhabitants of the State of Alabama were in a state of insurrection against the United States, that all commercial intercourse between the State of Alabama and the inhabitants thereof, and the citizens of other States, was and would remain unlawful, until such insurrection should have ceased or been suppressed, and that all goods, chattels, wares and merchandise coming from the said State of Alabama into other parts of the United States, without the special license and permission of the President, would be forfeited to the United States; that such restrictions and prohibitions and liabilities to forfeiture continued until May 22d, 1865, and that, until the proclamation of the President, issued on the 2d of April, 1866, the inhabitants of the State of Alabama could have had no standing in this Court; that, immediately after the removal of the prohibition of intercourse, Mr. Goodman applied to the company at New York, to receive from him whatever of such annual premiums might be found in arrear, together with interest thereon, and offered to do whatever he was bound to do for the preservation or restitution of his rights under the policy, but the defendants refused to entertain such proposal, and denied that Goodman had any rights in the premises; that, after such refusal, Goodman died; that the plaintiff, immediately after his appointment as executor, caused application to be made to the Company at New York, to receive from him whatever of the annual premiums might have

been in arrear at the time of the death of Goodman, together with interest thereon, and offered to pay the same, or to abate the same from the amount of the policy, and to do whatever else he was required to do; and gave notice, and offered to make due proof, of the death of Goodman, but the Company refused to receive said premiums, or to accept such proof, or to pay said policy, or the additions thereto, or any part thereof; that the Company pretends that the policy was forfeited by the non-payment of premium; that any other compliance than as aforesaid with the terms and conditions of the policy was, without any act or default of Goodman, suspended and prohibited and rendered impossible; and that it is contrary to equity and good conscience that a forfeiture of his valuable rights should be worked thereby. The prayer of the bill is that the rights of Goodman, and of the plaintiff, as his executor, under the policy, may be decreed to be valid and subsisting, and not to have been lost by forfeiture or otherwise, the plaintiff being ready and willing and offering to pay to the Company all such sums of money, together with interest thereon, as may appear to the Court to be justly and equitably due for premiums on the policy; that the Company may be enjoined from asserting any forfeiture of the policy or of the rights of the assured or of the plaintiff, under the same; and that the defendants may be decreed to pay to the plaintiff the amount thereby assured, with such additions thereto as have accrued and been made or credited to Goodman under the same.

The answer avers, that, if Goodman had been ready and willing to pay the annual premiums falling due March 2d, 1862, and thereafter, it would have been unlawful for him to have made such payments, and equally unlawful for the defendants, after the 16th of August, 1861, to have received such payments and continued the policy in force; that no payment has been made on the policy to the defendants, since the 2d of March, 1861; that none was offered or tendered to be made until after June, 1865; that the policy expired and ceased to exist, by its terms, on the 3d of March, 1862; that, at the time the policy was issued to Goodman, Thomas W. McCoy was the agent of the defendants at Mobile, in and for the State of Alabama; that the appointment of McCoy as such agent, in and for said State, was revoked by the defendants in March, 1861; that Goodman had notice thereof; that, since that time, the defendants have not had any agent in and for the State of Alabama; that the citizens of the State of Alabama, and that State, on the 12th of April, 1861, rebelled against, and

instituted a civil war against, the government of the United States, and organized a government in hostility thereto; that thereupon all the citizens and inhabitants of that State, and the said Goodman, a citizen and resident thereof, became and were from thenceforth alien enemies, and so continued to be up to and until the cessation of said hostilities in May, 1865; that the restrictions and prohibitions and liabilities to forfeiture declared by the proclamation of August 16th, 1861, continued until the 22d of May, 1865; that, after the 16th of August, 1861, and before the 22d of May, 1865, it was unlawful for the defendants to insure the life of Goodman, or to receive from him, or credit him with, any premium on the policy; and that such state of insurrection and war, of itself, terminated the policy, and all the rights and interests of Goodman or his assigns therein, and also terminated his membership of said Company, and all his rights and privileges as a member thereof, and all right thereafter to participate in the investments, earnings and profits thereof.

The 3d section of the act incorporating the defendants provides, that "all persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation, and no longer." The 13th section of the same act provides, that "any member of the Company, who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the Company, may be prohibited by the trustees from sharing in the profits of the Company, and all such previous payments made by him shall go to the benefit of the Company." On the 22d of February, 1848, a resolution was adopted by the Board of Trustees of the Company, providing, "that any member of the Company who would be entitled to share in the profits, who shall have omitted to pay any premium or periodical payment due from him to the Company, shall not share in the profits of the Company, and all previous payments made by him or her shall inure to the benefit of the Company."

The principle of law on which the defendants contend that the war terminated the existence of the policy, is the familiar one, that an executory contract, of continuing performance, made before the breaking out of a war, with an alien enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is *ipso facto* dissolved by the declaration of war,

which operates for that purpose with a force equivalent to that of an Act of Congress. The *William Bagaley*, 5 Wallace, 377, 407; *Hanger vs. Abbott*, 6 Wallace, 532, 536; *Esposito vs. Bowden*, 4 Ellis & Blackburn, 963 and 7 Id., 763; *Reid vs. Hoskins*, 4 Ellis & Blackburn, 979. Assuming that Goodman could not pay the annual premiums on the policy without commercial intercourse with the defendants at New York, he being a resident citizen of Alabama, the argument is, that the policy was executory; that the vital principle of the contract is the payment of the annual premium by Goodman, and the consequent liability of the Company to pay the amount insured, in case of the death of Goodman during the period covered by the payment of premium; that the continued existence of the policy depended on the punctual payment of the premium every year by Goodman; that, by the express terms of the policy, the non-payment of the premium relieved the defendants from liability; that, in this respect, the contract was executory, and its continued existence absolutely demanded continued intercourse and dealings between the parties; and that the contract is, therefore, brought within the very definition of the authorities as an executory contract of continuing performance.

Where a contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, the only effect of the war is to suspend its operation, and, on the return of peace, the rights of the parties under it may be enforced. In the case of *Manhattan Life Ins. Co. vs. Warwick*, 20 Grattan, 614,* in March, 1871, the Court of Appeals of Virginia, by a majority of three judges against two, held, that a policy of life insurance, in a like situation with the one at the bar, in the particulars involved in the question now under consideration, was suspended, but not dissolved, during the continuance of the late civil war. The view taken by the majority of the court was, that the contract was altogether executory on the part of the Company, in the sense that they had done nothing yet toward the performance of it on their part; that it had, however, been largely executed on the part of the assured, creating a right which could be defeated only by a default on his part; that this right was a right to the insurance not merely for one year, but for the life of the assured; that a new contract every year was not necessary to give the right, but only the annual payment of the premium was necessary to prevent the divesting of the right; that the principal that war dissolved the contract, had not been applied in a single instance to

* *Ins. Law Journal*, vol. 1, p. 115.

a contract made before the war and executed by one of the parties in part, before the war, and where the execution of the contract on his part was to be completed before he was entitled to any performance by the other party, or where the dissolution of a contract made before the war would work a forfeiture; that such an application of the rule would be arbitrary, unreasonable and immoral; that, when the contract is made before the war, but not executed by either party, and the carrying it into execution will involve a violation of the duty of the parties respectively to their countries, in the new relations which the war has created, in that case, its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved, and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit, to be absolved from the obligation of a contract, which, in the changed relations of their countries, cannot be carried into execution; that, on the other hand, if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without loss or forfeiture to one of the parties, and it cannot be carried into execution consistently with the duty of the parties to their countries respectively while the war lasts, in such case, it should not be dissolved, but only suspended; and that, if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

In respect to a policy of life insurance in like situation, the Court of Appeals of Kentucky, in the case of *New York Life Ins. Co. vs. Clopton*, 7 Bush, 179, in August, 1870, adopted the view, that the policy of the law does not avoid, because of the intervention of war, a pre-existing valid contract, which a single act, such as the payment of a debt, can perform; that, in such cases, a suspension of remedy during the war is the only effect of the war; that both principle and policy dissolve a contract, made before the war, for continuing performance, such as partnership or affreightment; that the policy of interdicting the payment of a debt is, that it may aid the enemy in the prosecution of hostilities; that, consequently, suspension of performance until the restoration of peace effectuates the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle of the temporary interdict; that, in that class of cases, it is the contract and not the performance that is continuing, and a suspension of the remedy, and not a dissolution of the contract,

is all that is necessary, befitting or just; that, in such cases as partnership and affreightment, the performance is continuous and unremitting until the end of the contract shall have been consummated; that, therefore, as supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war; that the reason for dissolution, in these two classes of cases, is inapplicable to contracts which may be performed by a single act, or by periodical acts, between which there is nothing to perform, and, consequently, no continuity of performance; that, between a single act and such periodical acts there is no apparent difference, in reason or principle; that, therefore, the law, which only suspends the remedy in the one case, cannot consistently dissolve the contract in the other; that, according to this definition, the ordinary contract of insurance does not seem to belong to the class of contracts of continuing performance, so as to be dissoluble because of an intervening war; that, in the case then before the court, the insurance was an executed entirety for the prescribed term, and the only performance which could devolve on the insurer was to pay the stipulated amount, in the event of loss insured against, fulfilment of which was not a continuing act, but a single act of a continuing contract; that the consideration, though payable in annual instalments, was also an entirety, and full performance was not of the kind technically styled continuing; and that, consequently, the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment.

I have dwelt somewhat at length on the views taken by the Virginia and Kentucky Courts in the cases referred to, because they are the only cases on the question of the effect of the late war in respect to the dissolution or non-dissolution of a contract of life-insurance, where it is assumed that the payment of the annual premiums required intercourse with the enemy, which have met my notice. I have no hesitation in saying, that I concur fully in the conclusions of those Courts on the question, and in the views above set forth, on which those conclusions are founded. Even if the policy be regarded, for the purposes of this question, as containing a contract on the part of the assured to pay the annual premiums, though a contract not enforceable by a suit to be brought by the insurer, but enforceable only through the pressure of the stipulation for forfeiture in case of the non-payment of such premiums at the specified times, and even though to pay such premiums requires

intercourse with the enemy, yet, the case is one where a suspension of performance on the part of the assured will effectuate, as respects the belligerent governments, the whole aim of the law, without dissolving the contract. As regards the obligation of the insurer, the contract was not one at all of continuing performance, although it was a continuing contract. All that the insurer had to do under it was to pay the sum insured, in case a loss insured against should occur, and the annual premiums had been duly paid, and the proper proofs of such loss were furnished.

There would seem to be no principle on which it could be held that, in this case, the war dissolved and abrogated this policy, which would not require the court to hold equally, that the policy would have been abrogated by the war if Goodman had died after the 16th of August, 1861, and before the 2d of March, 1862. In such case, Goodman having been alive on the 16th of August, 1861, the Court would be asked to hold that the rights of the parties were to be determined according to their *status* at the time the proclamation of that date was issued, and that, although Goodman had punctually paid all previously accruing premiums, and had died without making default, yet the contract being one contracting for continuing performance by him in paying premiums annually, it was abrogated by the war on the 16th of August, 1861, so that the insurer was released from liability on it. A decision to that effect would shock every sense of justice. Yet it can make no difference that Goodman did not happen to die before the 2d of March, 1862. If the principle is to be applied to this policy at all, it must be applied as of the 16th of August, 1861. If it is not applied as of that date, it cannot be applied as of any other date. Its applicability cannot be made to depend on the question whether, in fact, Goodman survived after the 16th of August, 1861, until after it became necessary for him to do an act of performance under the contract.

There is another suggestion which seems to me of great force. In all the cases, so far as I have observed, where the doctrine of abrogation has been applied to a contract of continuing performance, requiring, for such performance, intercourse with the enemy, the question arose on ground taken by the defendant in the suit, when sued for the breach of, or to enforce, some stipulation of the contract, which could be enforced against him by suit, that he was absolved from such stipulation by the dissolution of the contract through the operation of a war. The present case is not such a one. The defendants cannot, in respect of their obligation under

the policy, set up, as a defense against the payment of the sum insured, the dissolution of such obligation by the war, any more than the maker of a promissory note, given before the war, could set up, after the end of the war, that his obligation to pay the note was abrogated by the war. In respect of the stipulation in regard to the payment of annual premiums, this is not a suit to enforce such stipulation or any liability under it, and the party who was, by the contract, to make such payments, does not set up, as a defense against an obligation to make them, a dissolution of the contract by the war.

It is further insisted, on the part of the defendants, that, if it is unlawful to insure the property of an alien enemy, it is *a fortiori*, unlawful to insure the life of an alien enemy; that such an insurance could not lawfully be made during the existence of a war; that the acceptance of a renewal premium is virtually a new insurance, the obligation of the insurer lasting only for the period for which the premium is paid; that it matters not whether the alien enemy bears arms in the contest, or is merely an member of the hostile community; that the insurance of the life of an alien enemy gives aid and comfort to the enemy; and that, if it were to be held that the life of the plaintiff's testator, and the lives of many others similarly situated, continued to be insured after the breaking out of the war, under policies made before it broke out, then, if the persons insured had died during the war, the amounts or values of the policies would have been property capable of being used by the enemy of the United States in aid of the war against it, because certain to be realized and made available after the termination of the war.

It is not to be conceded that, under the policy in this case, the acceptance of a renewal premium would have been a new insurance. But an examination of the cases and text books on the subject of the dissolution by war of contracts of insurance made before the war, shows that the principle on which the rule rests does not extend to avoiding policies insuring property which is exempted by the laws of war from liability to be seized by the Government of the insurer's country. While the rule would avoid a policy insuring the life of one who should become an actual and active enemy of such Government, it thus acquiring the right to destroy his life, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy, who remained such in fact, and over whose life there is no belligerent power, on the part of the Government of the insurer. Though, by his domicile, he is

a technical enemy, so that his property may be lawfully captured as enemy property, yet, as such nominal hostility does not subject his life, like his property, to peril, no belligerent right is affected by continuing the validity of the insurance. "Consequently, in such a case," as is said in *New York Life Ins. Co. vs. Clopton*, before cited, "neither authority nor principle would avoid the policy, any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation." Nor is it perceived how the amount or value of a policy on the life of an alien enemy, who dies during the war, can be availed of, to aid the war, by the Government of the country of the assured, in any way or to any extent in or to which the amount or value of a promissory note made before the war, and falling due during the war, cannot be availed of, to aid the war, by the Government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war.

The bill alleges, that Goodman was not concerned, directly or indirectly, in bringing on the insurrection and rebellion mentioned in the bill; and that he did not bear arms against the United States during the continuance of such insurrection and rebellion, nor, in any way, directly or indirectly, aid or abet the enemies of the United States. The evidence is that Goodman did not favor secession as a measure of redress for alleged wrongs; that he did not bear arms against the United States; that he was enrolled among the citizens of Mobile for home defense, but was not called into service; that he paid the taxes and assessments which were levied upon him and his property by the power which ruled the State of Alabama; that he contributed to the relief of sick and wounded soldiers, and of the families of absent soldiers; that he held no office, during the war, under any government; that he was over age for field service in the army, or was otherwise exempted from such service, and was not conscripted and furnished no substitute for the army; and that he pursued the occupations of civil life during the war. On these facts, it cannot be held that any rule of law requires that the policy on the life of Goodman should be regarded as having been dissolved and abrogated by the war.

I have assumed, in the discussion hitherto, that Goodman could not, after the 16th of August, 1861, have paid to the defendants the annual premiums which accrued before the 22d of May, 1865, without direct intercourse with them. The fact is so. The bill

alleges, that Goodman failed to pay such premiums on or after the 2d of March, 1862, "because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead." The answer alleges, that the appointment of McCoy as the agent of the defendants at Mobile, in and for the State of Alabama, was revoked by the defendants on or about the 26th of March, 1861, and Goodman had notice thereof, and since that time the defendants have not had any agent in and for the State of Alabama. The statements of the bill and the evidence show that these allegations of the answer are true, and that the defendants had no agent in Alabama from March, 1861, up to January, 1869. In the absence, therefore, of any agent of the defendants in Alabama, it was impossible for Goodman to pay his annual premiums without direct intercourse with the defendants at New York.

The defense is also set up, that the policy, by its terms, ceased to exist by reason of the non-payment of the annual premium that was due and payable on the 2d of March, 1862, and that thereby, also, all previous payments made by Goodman became forfeited to the defendants. It is replied, on the part of the plaintiff, to this defense, that the defendants, by the act of withdrawing all their agencies from the State of Alabama, in March, 1861, prevented the payment by Goodman of his annual premiums, and thereby waived such payments, all of which became due after the 16th of August, 1861, the act of the defendants having prevented the payments in Alabama, and the effect of the war being to make such payments at New York by Goodman unlawful.

It was a part of the contract entered into by the defendants, or of their obligations to Goodman under it, that Goodman should have the right to pay his annual premiums to an agent of the defendants in Alabama, and if the defendants were bound to provide in Alabama, during the continuance of the risks on the policy, an agent to receive such premiums, then Goodman was not bound to seek any other recipient of such payments than such agent, and was not bound, for want of any such agent, to pay the premiums directly to the defendants at New York. In the application made in February, 1849, for the policy issued to Mrs. Goodman in March, 1849, Goodman is described as residing in Mobile, Alabama, and as being a wharfinger there. In his application of March, 1858, for the policy of 1858, and in that policy, he is described as of Mobile, in the State of Alabama. All

the premiums that he paid were, with the knowledge of the defendants, paid at Mobile, to McCoy, their agent there, and were received by the defendants through and from McCoy. Goodman resided in Mobile from 1835 up to his death, and died at Mobile. In the absence of any notice to the contrary, the defendants must be held to have continued to understand that he continued to reside in Mobile. His application for the policy of 1858 was made through McCoy, at Mobile, the policy was delivered to him through the hands of McCoy, at Mobile, and bears McCoy's signature as agent at Mobile, the three payments of premiums in 1859, 1860, and 1861, were made through McCoy at Mobile, and the receipts therefor bear the signature of McCoy as the defendants' agent. The policy contains on its face the words: "Agents of the Company are authorized to receive premiums when due, but not to make, alter or discharge contracts or waive forfeitures." It is contended by the defendants that there was no obligation on them to keep an agent at Mobile or in Alabama. Considering the character of the contract, the circumstances under which it was entered into, the fact that Goodman was, with the knowledge of the defendants, a resident citizen of Alabama at all times, the fact that the contract must be regarded as having been entered into, and continued in operation, by the defendants, at least as long as they themselves recognized its continuance, that is, until March 2d, 1862, with reference to, and in subordination on their part to, such statute law of the State of Alabama as should be enacted on the subject of their keeping agents in that State, and the fact that the agency of McCoy, having been continued during the life of the policy up to March, 1861, was then withdrawn, it must, I think, be held, that the defendants were bound to keep in Alabama an agent to whom Goodman could pay his annual premiums, or could at least offer or tender payment, such agent to be appointed in conformity with such statute law, and that, if the absence of such agent was all that prevented the payment of such premiums by Goodman, the defendants are estopped from setting up the non-payment of such premiums at the times stipulated therefor, as a defense to this suit.

The Alabama statute on the subject of foreign insurance companies, enacted February 24th, 1860, is in evidence in this case. Its provisions are applied, § 1190, to life insurance companies not incorporated by the laws of the State of Alabama, whether such companies are or are not organized on the mutual plan. It provides, § 1180, that no agent of any such company shall take

any risk or transact any business of insurance in Alabama, without first procuring a certificate of authority from the Comptroller of the State; that, before obtaining such certificate, such agent must furnish to the Comptroller a sworn statement showing the name and locality of the company, the amount of its capital stock, the amount of capital stock paid in, and the act incorporating it, and an instrument authorizing such agent to acknowledge service of process for and in behalf of the company, and consenting that service on such agent shall be taken to be service on the company; that no company incorporated by any other State, or any agent of it, shall transact any business of insurance, unless the company is possessed of at least \$100,000 of actual capital invested in stock of at least par value, or in bond and mortgage on real estate worth double the amount for which the same is mortgaged; and that, on a compliance with these provisions, the Comptroller shall issue a certificate thereof, with the authority to transact the business of insurance, to the agent applying for the same. It also provides, § 1182, that the agent, before taking any risks, or transacting any business of insurance, in the State, shall file in the office of the Judge of Probate of the county in which he may desire to establish an agency for the company, copies of the statement and instrument aforesaid. It also provides, § 1183, for the renewal annually of these proceedings. It also provides, § 1185, that every agent must annually deposit with the assessor of the county in which the agency is established, a sworn statement of the gross premiums received for insurance by the company at the agency during the preceding year. It also provides, § 1186, that such agent, before taking any risk or transacting any business of insurance, must pay certain local fees annually, so long as the agency is continued. It also imposes, § 1188, a penalty of fine and imprisonment for the violation of the provisions of the law. It also provides, § 1191, that the provisions of the law shall apply when the risk is taken, or any insurance business is transacted, in Alabama, by the agent of any company, whether the policies are signed by the officers of the company in or out of Alabama.

There can be no doubt that the passage of such a statute as this was within the competence of Alabama. That State had a right to impose such terms and conditions as it chose, in granting its assent to the recognition of the defendants in Alabama, and of their rights under policies to be issued in Alabama to citizens and residents of Alabama, and to exact, in its discretion, such security as it thought proper for the performance of the contracts of the

defendants under such policies. It also had a like right to regulate the business of agencies of the defendants in Alabama, with reference to future payments to become due on existing policies issued in Alabama to citizens and residents of Alabama. *Paul vs. Virginia*, 8 Wallace, 168, 181. The policy in question was, in fact, issued in Alabama, by the defendants, to a citizen and resident of Alabama, although it professes to have been delivered as well as signed by the president and secretary of the company. The receipt by McCoy of the premium paid at Mobile, March 2d, 1861, such premium having been received by McCoy as agent, under the authority to that effect on the face of the policy, made the contract of insurance, as respected the period to elapse before March 2d 1862, even if, as contended by the defendants, such payment of, premium created a new contract of insurance for a year, an Alabama contract, to be governed by the statute law of Alabama. Such receipt of such premium by McCoy was ratified by the defendants. I think the proper construction of the policy, as such policy stood when the payment to be made March 2d, 1862, became due, is, that, inasmuch as Goodman was then living, and the obligation of the defendants under the policy was outstanding, the defendants were bound to furnish Goodman with an opportunity on the 2d of March, 1862, and on every recurrence of the day of annual payment, to pay the premium to an agent of theirs in Alabama. As such payment to the agent would have been the transaction of insurance business in Alabama, the statute of that State required that the agency should conform to the statute. The defendants were bound to be ready to receive performance of the contract by Goodman through an agent in Alabama, such agent to be appointed in accordance with the Alabama statute. McCoy's agency in this case existed after that statute was passed. Such agency was withdrawn in March, 1861. Having been created before the war, it would not have been revoked by the war, at least so far as the right to receive payments of annual premiums was concerned. Payment of the premiums by Goodman to the agent would not have violated any law of war or any duty of Goodman's. *Ward vs. Smith*, 7 Wallace, 447, 453; *Conn. vs. Penn.*, 1 Peters' C. C. R., 496, 524, 525; *United States vs. Grossmayer*, 9 Wallace, 72, 75.

The evidence shows pecuniary ability and willingness on the part of Goodman to pay the premiums at Mobile, and that the reason why he did not pay them there was the absence of any agent there of the defendants. I see no legal objection to the evidence

on this subject, either as competent, or as sufficient to prove the facts. If the defendants were entitled to the punctual payment of the premiums, as a condition precedent to their continuing liability from year to year, their prevention of such payment, by the withdrawal of McCoy's agency, and of all other agencies in Alabama, excused Goodman from making the payments punctually, and debars the defendants from setting up such a want of punctuality as a defense in this suit. *Williams vs. Bank of the United States*, 2 Peters, 94, 102; *Van Buren vs. Digges*, 11 Howard, 461, 479.

There is no force in the objection, that the defendants could not, during the war, have received from their agent in Alabama, any moneys paid to him there as premiums, or that such moneys would have been confiscated in the hands of such agent, if paid to him. If the agent had been provided, Goodman could have tendered the premium, and the agent could have refused to receive it, because he could not remit it, and because it would be confiscated. The right of Goodman would thus have been preserved, according to the tenor of the contract. The loss, if any, which would have ensued to the defendants, was a loss incident to the war, and with which Goodman had no concern, and the apprehension or certainty of which could not affect his rights. The unlawfulness of any receipt by the defendants at New York, from Goodman or any other person in Alabama, during the war, of any moneys paid as premiums, cannot affect any rights of Goodman in respect of having the opportunity of paying such premiums in Alabama, or be set up by the defendants as a ground of forfeiture of the policy in respect of such rights.

Under these views the contract was only suspended during the war. After the end of the war, the right of Goodman to pay the premiums which he had been prevented from paying by the action of the defendants, continued, in all respects, as if the 2d of March, 1862, had not passed. Within a reasonable time after the close of the war, that is, in January or February, 1866, and before the coming around of any 2d of March after the close of the war, an application on behalf of Goodman was made to the defendants at New York, requesting them to recognize the policy on terms to be arranged. The reply of the defendants was, that they did not recognize the policy as valid, because it had been forfeited by the non-payment of premiums, and they refused to receive payment of the premiums in arrear. What thus transpired made it unnecessary for Goodman to tender the premiums due March 2d, 1866. In December, 1867, after Goodman's death, an agent of the

plaintiff presented to the defendants his claim on the policy, and tendered to them proofs of Goodman's death, and offered to pay any premiums that were in arrear. The reply of the defendants was, that the policy was forfeited, and they would recognize no liability upon it, and would not receive any premiums, or pay any loss upon it, but that they would, as a gratuity, pay what was the surrender value of the policy on the 2d of March, 1862.

The withdrawal of the agency of McCoy, and of the other agencies in Alabama, made it unnecessary for Goodman to seek out McCoy or some other person who had been an agent of the defendants in Alabama and tender the premiums, as due, to him, even though, as would appear from the evidence, McCoy remained in Alabama, accessible, during a part, at least, of the war. Especially is this so, in view of the fact that Goodman had notice of the revocation of McCoy's agency.

On all these considerations, I am of opinion that the defendants must be regarded as having prevented Goodman from paying his premiums, as due, in Alabama, where he had a right, by the contract, to pay them, and therefore, as having waived such punctual payment; that the policy was not, and is not, forfeited by reason of non-payment of premiums; that it is a valid and subsisting policy against the defendants; and that the plaintiff was, when he brought this suit, in a position to ask the relief prayed for by the bill.

These views recognize fully all the terms of the policy, and do not interpolate in the contract of the parties any provision, by way of excuse for non-payment, on the stipulated day, of any premium, which is not within the terms of the contract. It is of the essence of every contract, that, if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance. In this case, the prevention, by the defendants, of performance by Goodman, was equivalent to actual performance by Goodman, or to a waiver, by the defendants, of such performance.

But it is urged by the defendants that Goodman could have paid his premiums at New York; that, if he elected to remain in Alabama, where he could not or would not make payment of the premiums, it was his own fault; and that the existence of the war, and the prohibition of commercial intercourse between the State of Alabama and the City of New York, furnishes no legal excuse for the non-compliance by Goodman with his agreement to pay the premium on the designated days. Yet the defendants insist, in

their answer, that it was unlawful for them, between August 16th, 1861, and May 22d, 1865, to receive from Goodman any premium on their policy; and, on the argument, their counsel insisted, that if Goodman had, after the 16th of August, 1861, offered to pay the premiums as they fell due, it would have been unlawful for the defendants to receive such premiums. It was further insisted, that, notwithstanding this, the policy terminated because of such non-payment, for the reason, that the intervention of the war, as an excuse for non-payment, was not provided for by the policy. But these arguments are without avail to support the defendants' case. Their inability to receive the premiums, when due, in 1862, 1863, 1864, and 1865, amount to the same thing as if such premiums had been actually tendered, and the defendants had refused to receive them. Such inability to receive was a dispensing, by the defendants, with the punctual payment of the premiums, and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk. Such inability was a default on the part of the defendants, preventing Goodman, a citizen and resident of Alabama, from paying the premiums to the defendants at New York, and, therefore, dispensing with the payment of them, as performance by Goodman. The case is not one where the excuse set up is merely inability or impossibility of performance on the part of him who is to perform. It is one where inability on the part of the party to whom performance was due, to receive such performance—an inability notorious and known to the party owing performance—existed, and is set up by the party to whom performance was due, as a ground for forfeiting the rights of the other party under the contract, because he did not pay what it was impossible and unlawful for his obligee to receive. The cases in the books which were cited on the part of the defendants, as enforcing strictly the rule that a precedent condition on which, by contract, money is to be paid, must be absolutely complied with, were cases in which the impediment to performance existed solely on the part of him who was to be the actor in performance, and were not cases in which the impediment existed either solely on the part of him who was to be the recipient of performance, or was an impediment affecting both parties jointly, and equally in extent. The distinction is a sound one, and it would be gross injustice to apply to this case a rule the reason of which has no application to it. The defendants, in effect, say to Goodman: "It was unlawful for us to receive from you your premiums for

1862, 1863, 1864, and 1865, as they became due, it would have been idle for you to have tendered them to us, yet, as the contract was that you should pay them at specified times, and you did not pay or tender them at those times, the contract is forfeited, our liability to pay you the \$5,988.05 is at an end, and, beside that, the \$2,307.50 paid to us as premiums on the policies of 1849 and 1858, is forfeited to us." I do not believe a defense of that kind to a policy of life insurance situated like the present one was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind. Indeed, it has often been held, that the intervention of the law will excuse non-performance of a contract, where the operation of the intervention was solely on the party who was to perform and not at all on the party who was to receive performance. *Wolfe vs. Howes*, 20 New York, 197, 201; *Jones vs. Judd*, 4 Comstock, 411, 413; *The People vs. Tubbs*, 37 New York, 586, 588.

The views I have endeavored to maintain are concisely stated by the court in *Manhattan Life Ins. Co. vs. Warwick*, before cited. In speaking of the obligation of the insurer, under the policy, to pay the sum insured, the court say: "The Company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium, or by hindering or preventing the other party from paying it, or by any disability on its part to receive it, and which prevented the payment, which was not provided for in the contract." In the present case, the defendants are setting up their own disability to receive payment as a ground of forfeiture. In *New York Life Ins. Co. vs. Clopton*, before cited, the court say: "To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of another installment of premium, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay, when there was legal ability to receive the premiums."

There was, therefore, no forfeiture in this case. Goodman continued to be insured in the defendant's Company until his death, and was a member of the Company at the time of his death. He was entitled, under the policy, at the time of his death, to all the rights, in respect to the sums insured by the policy, and of all proper increase of such sums insured, as the result of dividends made to members, up to

the time of his death, which he could have been entitled to if the defendants had received and accepted all the annual premiums specified in the policy. The resolution of February 22d, 1848, cannot be interpreted as applying, or having been intended to apply, to a case like the present one. Goodman did not "omit" to pay any premium, in the proper sense of that word. His failure to pay was wholly inactive and involuntary, and was no default on his part, but was, as between him and the defendants, the default of the defendants.

Nor is there any force in the view, that, Goodman being a partner with the other persons insured in the defendant's Company, the partnership was dissolved by the war. The relation between him and such other persons, assuming that they were domiciled in New York during the war, because the Company is a New York corporation, was not such a relation of partnership as requires the application to it of the rule that a war dissolves a contract of commercial partnership between enemies. The views before stated in regard to the effect of the war on the policy, as a contract between enemies, apply to it equally in its aspect as a policy issued by a Company doing business on the mutual plan. The relations of Goodman to the partnership and to his partners, and his duty to it and them, as a member, were created and are to be measured wholly by the terms of the policy, and no different rule can be applied to the policy because it was issued by a mutual company, than would have been applied to it if it had been issued by a company of which the insured did not, by the insurance, become a member.

I have carefully considered all the views urged by the defendants, and am entirely satisfied that the plaintiff is entitled to a decree, with costs. There must be a reference to a master to take and state an account of the amount due on the policy, with interest, such amount to be computed on the basis before stated, and the defendants to be allowed credit for the unpaid annual premiums.

SUPREME COURT OF NORTH CAROLINA,

JANUARY TERM, 1872.

From Granville Superior Court.

RUFUS BOBBITT, *Appellee*,*vs.*THE LIVERPOOL & LONDON & GLOBE INS. CO., *App't.* }

Insurance contracts are in general subject to the same rules of construction as other contracts.

Where there are several separate writings, all about the same matter, between the same parties, referring to each other, and all necessary to complete the whole, they are all to be read together as if they were all one.

The application for a policy of insurance forms a part of the contract of insurance, where the policy refers to it as such; and the plaintiff must set it out in his complaint.

The description in the application being in the nature of a warranty or condition precedent, it is necessary that the insured should prove it. The burden of proof is upon him.

The doctrine of immateriality does not apply when the representation is a part of the contract, and especially when it is in reply to a direct question.

When the representation is no part of the contract it vitiates the policy only when fraudulent.

It was sufficient to avoid the policy, if the description made in the application was false, however honestly made.

One whose property is insured at his own request in the name of another who is his agent, has an insurable interest.

M. V. LANIER, *for Appellant.*PHILLIPS & MERRIMON, *for Appellee.*

This was a civil action, tried before His Honor, Judge Watts, at July Special Term, 1871, of Granville Superior Court.

The action was brought upon a policy of insurance issued by the defendant at the instance of plaintiff, to and in the name of one Newnan, against the loss of certain tobacco, &c., by fire.

The policy was based upon the application. The application is in the usual form, and contains a series of questions propounded to Newnan, and his answers thereto; amongst others, the following:

Q. What is the present cash value of the property on which insurance is wanted?

A. The present cash value of the tobacco on hand is \$30,000, and

it will be increased to \$50,000. The average value on hand, say \$30,000.

There were printed on the back of the policy, not signed, a number of statements under the heading, "The conditions and stipulations referred to in this policy," amongst which is this :

"1. The basis of this contract is the application of the insured, and if such application does not truly describe the property, this policy shall be null and void."

The policy reads thus :

"This policy of insurance witnesseth, that Dennis P. Newnan, having paid to the London and Liverpool and Globe Insurance Company, the sum of five hundred dollars, for insurance for loss or damage by fire, (subject to the conditions and stipulations endorsed hereon, which constitute the basis of this insurance.)

* * * * *

the Company do hereby agree that from — until — the funds and property of said Company shall (subject to the conditions and stipulations endorsed hereon, which constitute the basis of this insurance) be subject and liable to pay, reinstate or make good to the said assured, their heirs, executors or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned, and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified," &c., &c.

The answer alleged that the representations of Newnan were in several respects false and fraudulent, and insisted that Newnan, who was plaintiff's bailee, had no insurable interest. On the trial it appeared that the policy was obtained in the name of Newnan, but for plaintiff's benefit, though plaintiff's name does not appear in the policy, and that Newnan had assigned this policy to plaintiff. There was also evidence tending to show that the representations contained in the application as to the value of the tobacco were false and also fraudulent. The defendant insisted that the application and the endorsed memoranda, headed "Creditors &c." formed a part of the contract of insurance and warranty, and if false the plaintiff could not recover, and applying that principle to the evidence, that if the jury believed from the evidence that the cash value of the tobacco in the plaintiff's factory at the time of making the application was greatly less than thirty thousand dollars, the plaintiff would not be entitled to recover.

His Honor declined these instructions and charged the jury :

"That if they believed from the evidence that the plaintiff had twenty thousand dollars worth of tobacco in the factory at the time

of the fire, and he sustained loss to that amount by reason of the fire, that he is entitled to recover twenty thousand dollars.

That the application was a representation and forms no part of the contract.

That the application was not embodied in the policy and is no part of the same.

That the only question for the jury to consider is the amount of the tobacco in the factory at the time of the burning.

That Newnan did have an insurable interest.

That the statements in the application were merely representations, and unless they were fraudulent and false they would not bar the plaintiff's right of recovery."

Many other interesting questions are presented by the voluminous transcript, but as the decision is based upon the two points developed by this report, it is deemed best not to anticipate, as from all appearances our case will again appear in this court in a new garb.

There was a verdict and judgment for the plaintiff for \$20,000, and the defendant appealed.

READE, J.

The plaintiff made a written application to the defendant to insure his property, in which application he undertook to describe the property, its character, quantity, value and situation. In consequence of that application and the payment of \$500, the defendant agreed to insure the property for twelve months against fire, or to pay \$20,000 if the property should be burned, if the loss should be so much, or else as much as the loss should be, and gave the plaintiff a policy to that effect.

The application was a printed form furnished by the defendant with questions to be answered, and with blanks for the answers, and the blanks were filled up in writing by the plaintiff and signed by him. There was a printed heading to the application, setting forth that, "the estimated value of personal property, and of each building to be insured, and the sum to be insured on each must be stated separately. When personal property is situated in two or more buildings, the value and amount to be insured in each must be stated separately, three-fourths only of the value to be insured, etc."

The application described the property insured as, "raw and manufactured tobacco in a two-story framed building, &c." And in answer to question 8, of the form, "what is the present cash value of the property on which insurance is wanted?" the response is, "the present cash value of the tobacco on hand is \$30,000, and it will be

increased to \$50,000, the average value on hand say \$30,000." And the application concludes in print as follows: "And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full and true exposition of all the circumstances with regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk."

Upon that application the defendant issued to the plaintiff a \$20,000 policy, in which it is expressed to be "subject to the conditions and stipulations endorsed on the back of the policy, with constitute the basis of this insurance."

One of the aforesaid conditions and stipulations on the back of the policy is as follows:

"1. That the basis of this contract is the application of the insured, and if such application does not truly describe the property, this policy shall be null and void."

The first question for our consideration is, what is the nature and effect of that application? Is it a part of the contract, and in the nature of a warranty or condition precedent that the property was as described, or is it a representation preliminary to and outside of the contract?

It may be premised that insurance contracts are in general, subject to the same rules of construction as other contracts. And it is a familiar rule that where there are several separate writings all about the same matter, between the same parties, referring to each other, and all necessary to complete the whole, they are all to be read together as if they were all one. Apply that rule to the case before us. The application asks for the policy, and describes the property, and covenants for the verity of the description. The policy is issued as asked for in the application, and refers to another writing on the back of the policy for the "conditions and stipulations subject to which it is issued." And that writing refers back to the application, upon the verity of which the policy is to be valid or null and void. Take away either of these writings, and the contract would be incomplete, and the rights of the parties could not be declared. Read them together, and the contract amounts to this:

The plaintiff proposed to the defendant to insure him \$20,000 on property, the "present cash value of which was \$30,000," and to continue on an average about that value for twelve months, and that the property was at that time, and would continue to be in a certain two-story frame building which was described. And the defendant agreed that if the plaintiff would give him \$500, he would make the insurance,

and would pay him \$20,000 in case of fire, if he should lose so much, or such less sum as the loss might be: with the understanding that the property was as described, and should continue so to be, else he was to pay nothing at all.

This view of the case will be found to be abundantly supported by Parsons on Contracts, Parsons on Marine Insurance, and Archbold's Nisi Prius, title Insurance, and by the adjudged cases cited by them. It is sufficient to quote the following from Archbold:

"Modern policies of insurance usually contain a number of conditions, stipulations, warranties, &c., either in the body of the instrument or endorsed upon it. Frequently the policy refers to certain printed proposals of the company as containing the terms of the contract; and in such cases such printed proposals must be deemed a part of the policy, even although they be without stamp, or seal, or signature."

The application being, therefore, a part of the contract, an important enquiry was, whether the property was correctly described in the application. And the first question is, upon whom was the burden of proof? The burden of proof is upon the plaintiff. It would be otherwise if the application were not a part of the contract, but was a mere representation.

Being a part of the contract it was necessary for the plaintiff to set it out in his complaint; and it being in the nature of a warranty or condition precedent, it was necessary that the plaintiff should prove it. Archbold says: "Where conditions are endorsed upon the policy or contained in certain proposals referred to in the policy, they must be set out in the declaration, and there must be an averment showing that the plaintiff has observed them. And where a compliance with them is in the nature of a condition precedent to the plaintiff's right to recover, a strict compliance must be observed." And again: "If an averment of compliance with any of the conditions endorsed on the policy, or contained in any of the proposals of the company referred to in the policy, be traversed, then, if the traverse be in the negative, the policy must prove the averment; but if the averment be in the negative and the traverse be in the affirmative, the defendant must prove his traverse. And if any of these be a condition precedent to the plaintiff's right to recover, the compliance with it must be strictly averred and as strictly proved."

The complaint in this case, Art. VI, does aver that the plaintiff had "fulfilled all the conditions of the insurance," but it does not set out the conditions embraced in the application, under the idea, we suppose, that they were not a part of the contract. This defect

may be remedied by an amendment at the discretion of the judge below, when the case goes back, if the plaintiff chooses to move. The defendant's traverse is also general. But considering the complaint to contain all the necessary averments, and the defendant's traverse to be in the negative—which is the most favorable view for the plaintiff, because as we have seen it is necessary that the complaint should contain them—then the burden of proof is upon the plaintiff; and he must show that the cash value of the property at the time of the application, or at least at the time the policy issued was \$30,000, and that it continued to be about that up to and at the time of the fire.

It was much insisted on, in the argument here, that even if the description of the property was false, yet it was *immaterial*, and therefore did not interfere with the plaintiff's right to recover. But the doctrine of immateriality does not apply when the representation is a part of the contract, and especially when it is in reply to a direct question. "Where the representation is no part of the contract, it vitiates the policy as being a fraud merely; and therefore if it be immaterial or be substantially complied with, it will not affect the validity of the policy." But if the description of the property were not a part of the contract, but were a mere representation, still it is a great mistake to say that it is immaterial. It was said to be immaterial because the policy compels the defendant, not to pay \$20,000, but only so much as should be lost by the fire, and therefore the less property on hand to be burned, the less risk for the defendant and the better for him. If that were so it would be difficult to account for the provision in the policy that the defendant would not insure for more than three-fourths the value of the property on hand. The reason for this limitation is, plainly, to make it to the interest of the plaintiff to take care of the property, and to prevent the dangerous temptation to destroy it for gain. No one can suppose that the defendant would have insured the plaintiff \$20,000 if he had supposed that the property was only worth \$20,000, or probably not half so much.

From what we have said, it will appear what were the errors on the trial below, without noticing the defendant's many exceptions, *seriatim*. His Honor informed the jury that the application was not a part of the contract; that it was a mere representation, and that the only enquiry for them was the value of the tobacco burned. And he very emphatically excluded everything else from their consideration. All this was error.

It is said, however, that a subsequent part of the charge cures these errors. His Honor closed his charge by saying, "The statements in the application were mere representations, and unless they were fraudulent and false, they would not bar the plaintiff's right to recover." If this were so in theory, still it would be dangerous to allow a verdict to stand where there is so much probability that the jury were misled. After he had emphatically told them that the only enquiry was, how much tobacco was burned, what did they care for "mere representations," which were "no part of the contract." But it was not right in theory. Let it be supposed that the statement of the value of the tobacco was a mere representation—a representation of a *fact*—and that representation was *false*, but not *fraudulent*, and misled the defendant in a material matter; the plaintiff could not recover. A representation as an *opinion*, must be not only false but fraudulent; but not so with the representation of a *fact* as distinguished from an *opinion*. The principle is very well stated by Archbold:

"As the underwriter calculates his risk by what is told to him by the insured at the time of effecting the insurance, the law exacts from the assured, not only that he state all he knows material to the risk, but that what he states shall be perfectly true—insurance being a contract in which the utmost good faith is required to be observed on the part of the assured, and if upon effecting an insurance, any representation is made to the underwriter, which is material, and if true, would lessen the risk, if such representation turn out to be false, it will have the effect of vitiating the policy. And it matters little to him whether the party making the representation knows it at the time to be false, or does not know whether it is false or true, or believes it to be true from the representations of others," &c. So that His Honor erred in telling the jury, that the representations must be "false and fraudulent." It was sufficient to avoid the policy if they were false, however honestly made; because it was the representation of a fact calculated to mislead, and not an expression of opinion or belief.

When the case is tried again, the application, the policy and the conditions and stipulations must all be considered as one instrument, as containing the contract. And the plaintiff must aver and prove compliance with all his part of the contract.

If the plaintiff recover, he is entitled to the value of the property burned, which was embraced in the policy, not exceeding \$20,000. The value of the tobacco, was what it was worth then and there—

what it would have sold for then and there, or what it would have netted the plaintiff in the usual markets, after paying stamp duty and all other usual and necessary expenses.

We do not sustain the defendant's exception that the plaintiff had no insurable interest.

There is error. Venire de novo.

SUPREME COURT OF MISSOURI,

MARCH TERM, 1872.

Appeal from St. Louis Circuit Court.

ROBERT K. WOODS, *Assignee of*

EDWARD P. TESSON, *App't.*,

vs.

THE ATLANTIC MUTUAL INS. CO., *Resp't.**

Where the defense was a breach of warranty in the description of the building, and fraud in not disclosing the entire description of the premises, as they really existed, and there was evidence tending to show that the agent of the plaintiff, at the time of making the application, stated that he did not know that the description he gave was correct, but that he would send plats, which plats were afterwards sent, the court erred in refusing instructions, presenting the issue, and giving an instruction to the effect that the plaintiff could not recover.

Whether such maps were to be delivered, and were, in fact, delivered, or shown to the agent of the defendants, were questions of fact to be determined by a jury.

If the matter was left open as indicated, till the maps were delivered or produced, then the material facts, not disclosed in the application and policy as written out, were furnished, and the agent of the defendant might have returned the premium and withdrawn the policy.

If a plaintiff makes out a case, upon which he can go to the jury, the court has no right, after the evidence is in to assume it to be true, and require the jury to find for the defendant, or, what is the same thing, to declare that, upon the whole case, the plaintiff is not entitled to recover.

The facts given in evidence by the plaintiff if true, made out a *prima facie* case, and the jury ought to have been suffered to pass upon them.

GLOVER & FARISH, *for Appellant.*

KNOX & HILL, *for Respondent.*

ADAMS, J.

This was an action on a policy of insurance issued by the defendant

* Decision rendered April 22d, 1872.

to Edward P. Tesson, who originally brought the suit and becoming bankrupt it was afterwards prosecuted in the name of the plaintiff as assignee in bankruptcy. It was an insurance against loss by fire on a distillery building and machinery. The description of the building embodied in the policy was, "his three or four story brick distillery building, and machinery in the same, not running, no fire in or about, situated entirely detached on the bank of the Mackinaw River, in the town of Torneyville, Woodford county, Illinois, valued at thirty-two thousand dollars."

The description in the application for insurance was substantially the same with this addition: "gable end is frame."

The defense was that the policy was avoided by breach of warranty in this, that by the application and policy Tesson warranted that the premises insured were built of the materials stated in the policy and application, and that they were situated entirely detached, when in truth the warranty was false in this that the distillery building was not built of brick, but that the third story was built entirely of wood, and a portion of the distillery building one story high, sixty feet long and thirty feet wide was built entirely of wood, and that the boilers for the distillery were under a shed roof outside the wall of the distillery, and as a further defense the same matter was set up as a fraudulent concealment and misrepresentation by the insured in not disclosing the entire description of the premises as they really existed.

The proof conduced to show that Tesson owned but one distillery, and that was the one in question; that at the time the insurance was effected, Tesson, who was in the vicinity of the premises, acquired the distillery by foreclosure of mortgage, and immediately telegraphed to his agent in St. Louis to insure it; that the agent went to the office of defendant and made known his business, and the agent of defendant drew up the application, which the agent of Tesson signed; that Tesson's agent stated at the time that he did not know that this description was correct, but that he had plats of it at his office and would go and fetch them, and if the description was inaccurate that it might be made perfect; that he did bring the plats and left them with defendant's agent; these plats were put in evidence, and one of the plats had written underneath, "the first and second stories are of brick," and the evidence conduced to show that the distillery as a whole stood detached from any other building of adjoining proprietors; that the main part of the building was three stories high, two stories of brick and the third story of wood; that there were boilers set in brick outside of the buildings covered with a shed roof on posts and supported against the wall, with an engine in the cellar; and that

there was a wooden addition to the main building one story high and some sixty feet long and thirty feet wide, used in connection with the distillery and as part of it.

The defendant introduced several insurance agents, who testified to the effect that in their opinion [that] the risk or hazard on the building as proven to be, would be greater than on such as described in the application and policy. Some of them also testified that the rate of premiums as charged in the policy was ample and sufficient for insurance on the buildings as they really existed or were shown to have been.

After the close of the case the parties asked instructions, presenting the issue whether this distillery building was the identical subject insured in the policy, or whether there was a misrepresentation of any material fact or a breach of the warranty, created by embodying the representations made in the policy.

But the court refused all instructions asked, and gave an instruction to the effect that the plaintiff could not recover.

This case was before this court formerly, and is reported in 40 Mo. Rep. 36. It was then in the shape of a bill in equity to reform the policy, on the alleged ground that there was a mistake made in describing the premises, but the proof in the opinion of the court failed to establish such mistake. Judge Holmes in delivering the opinion of the court, said: "the rule is, in cases of express warranty, it is wholly immaterial whether matters warranted were material to the risk or not, but here the question is rather as to what was warranted. This depends partly upon the true interpretation and proper construction of the policy, and in part upon the question of fact whether the buildings were, in fact, in every material respect, the same as they were described in the policy, and whether the actual warranty has been complied with or not. It becomes essentially a question whether the facts not literally embodied in the description in the policy, and so not disclosed, were material to the risk; and there can be no doubt that this is a question of fact for a jury." The judgment was reversed and the cause sent back so that the plaintiff might proceed at law upon an amended petition if he chose to do so. As the record now stands before this court the ruling above quoted seems to me to be more favorable to the defendant than the facts of this case justify.

It seems that neither of the agents, at the time the application was made, had any definite knowledge of the exact description of the building or of the materials of which it was composed, and the evidence also conduced to show that as part of such description, maps

were afterwards to be produced by the agent of Tesson, and that such maps were in fact furnished. That underneath one of the maps was written "the first and second stories are of brick." Now the natural impression would be that the rest of the building above the ground was of wood. This evidence also conduced to show that the whole matter was as it were *in fieri*, or left open for the delivery of the maps. Whether such maps were to be delivered, and were in fact delivered or shown to the agent of the defendants, were questions of fact, to be determined by a jury. If the matter was left open, as indicated, till the maps were delivered or produced, then the material facts not disclosed in the application and policy as written out were furnished, and the agent of the defendant might have returned the premium and withdrawn the policy. But no such offer appears in the evidence.

I am clearly of the opinion that the court erred in withdrawing the case from the jury, by the instruction given on its own motion. It was in the nature of a demurrer to the evidence produced on all the facts detailed in evidence before the jury, on both sides. If a plaintiff makes out a case upon which he can go to the jury, the court has no right, after the evidence is in, to assume it to be true, and require the jury to find for the defendant, or, which is the same thing, to declare that upon the whole case, the plaintiff is not entitled to recover. Assuming, however, that the Court's instruction was based alone upon the plaintiff's case, it was not proper thus to take the case from the jury. The facts given in evidence by the plaintiff, if true, it seems to me made out a *prima facie* case, and the jury ought to have been suffered to pass upon them.

Judgment reversed, and cause remanded.

The other judges concur.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

In Error to the Circuit Court of the United States for the District of Iowa.

THE UNION MUTUAL LIFE INS. CO. OF MAINE, }

Pl'ff in Error, }*vs.*

HENRY WILKINSON.*

The assured, in a life policy, in reply to the question, had she ever had a serious personal injury, answered no. She had, ten years before, fallen from a tree. The criteria of a serious personal injury considered.

This is not to be determined exclusively by the impressions of the matter at the time, but its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide, from these and the nature of the injury, whether it was so serious as to make its non-disclosure avoid the policy.

Insurance companies, who do business by agencies at a distance from their principal place of business are responsible for the acts of the agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals, which are not brought to their knowledge.

Hence, when these agents, in soliciting insurance, undertake to prepare the application of the insured, or make any representations to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance companies, and not of the insured.

This principle is rendered necessary by the manner in which these agents are sent over the country by such companies, and stimulated by them to exertions in effecting insurance, which often lead to a disregard of the true principles of insurance as well as fair dealing.

In such cases the insurers cannot protect themselves under instructions to their agents, that they are only agents for the purpose of receiving and transmitting the application and the premium.

Therefore, where the agent had inserted in the application for life insurance a representation of the age of the mother of the assured, at the time of her death, which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured, it was the act of the company, and not of the assured, and did not invalidate the policy.

To permit verbal testimony to show how this was done by the agent does not contradict the written contract, though the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company, by the acts of their agent in the matter are estopped to set up that it is the representation of the assured.†

McCRARY, MILLER & McCRARY, and

JOHN H. CRAIG & W. J. COCKRAN, *for Plaintiff.*GILLMORE & ANDERSON, and GEO. G. WRIGHT, *for Defendant.*

* Decision rendered April —, 1872

† Syllabus furnished by Clerk.

Mr. Justice MILLER delivered the opinion of the court.

This was an action on a policy of insurance, obtained by defendant in error on the life of his wife from the corporation, which is here as plaintiff.

The making of the policy and the death of the wife being admitted, the defendant below assumed the burden of a defense, which rested on the falsehood of certain answers to questions found in the application of plaintiff.

By the terms of the policy it became void if any of these representations proved to be untrue. The plea of defendant sets up some ten or twelve of these responses as false, but the questions presented here relate to but two of these.

In answer to interrogatory No. 9, "Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature, and at what age?" The parties answered "No."

In regard to this, defendant asserted that in the year 1862, some five or six years before the application was made, and when the wife was about fourteen years old, she had been seriously injured by a fall from a tree.

Under a rule of practice in the State courts of Iowa, adopted by the Circuit Court of that district, the judge required the jury to respond to the following interrogatory:

"Did Malinda Jane Wilkinson, (the wife,) in the year 1862, receive a serious personal injury by falling from a tree?" to which they answered, "Yes; injured, not seriously."

As the defendant concedes that, to defeat the action, the injury must have been serious, the response of the jury would seem to be conclusive. But the counsel for defendant argue that the jury were misled in making this response by the instruction of the court on that subject, and by the further question, which it propounded to them in regard to the same matter. This other question is thus stated in the record: "Were the effects of such fall temporary, and had these effects wholly passed away without influencing or affecting her subsequent health, or length of life, prior to the time when the application for insurance in this case was taken?" To this the jury answered, Yes.

And on this branch of the case the court said to the jury that, if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect her health or shorten her life, then the non-disclosure of the fall is no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken,

or if the fall affected the general health or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for defendant that if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party, whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over it completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them,—*Wilkinson vs. Connecticut Mut. Life Ins. Co.*, 30 Iowa Reports.

The other answer, which defendant alleges to have been false, is made to an inquiry as to the age of the mother at the time of her death, and the disease of which she died.

The application shows that it was answered that she died at forty, of a fever. Evidence was given by defendant tending to prove that she died much younger of consumption. In avoidance of this, plaintiff was permitted to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death or her age at the time; that the wife was too young to know or remember anything about it, and the husband had never known her. But that there was present at [the] time the agent was taking the application, an old woman, who said she had knowledge on that subject, and that the agent questioned her for himself, and from what she told him he filled in the answer which is now alleged to be untrue, without its truth being affirmed or assented to by plaintiff or the wife. The jury find all this in their special verdict, and also find that the mother died at the age of twenty-three years, and did not die of consumption. The husband and wife had all been slaves, and it is found that the applicant did not know, when the application was signed, how the answer to this question had been filled in.

And on this subject the court instructed the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

To the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject the defendant excepted; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do

so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice.

This rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff, in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they

knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear, that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by defendant, who procured plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or as it is sometimes called, estoppels in pais. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not so well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity, where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well considered judgments by the courts of this country. *Plum vs. Cataraugus Ins. Co.*, 18 N. Y. 392; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550; *Woodbury Saving Bank vs. Charter Oak Ins. Co.*, 31 Conn., 526; *Combs vs. The Hannibal F. & M. Ins. Co.*, 43 Mo., 148.

Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, Whose agent was Ball in filling up the application?

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation, which the agent represents.

They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party, who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers, by whom it is issued, but looks to and relies upon the agent, who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him?

It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured.

This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims.

The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie*, co-extensive with the business intrusted to his care, and will not

be narrowed by limitations not communicated to the person with whom he deals.—*Beebe vs. Hartford Ins. Co.*, 25 Conn., 251; *The Lycoming Ins. Co. vs. Shollenberg*, 8 Wright, 259; *Beal vs. The Park Ins. Co.*, 16 Wis., 241; *Davenport vs. Peoria Ins. Co.*, 17 Iowa, 274. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.—*Saving Bank vs. Charter Oak Ins. Co.*, 31 Conn., 517; *Horwitz vs. Equitable Ins. Co.*, 40 Mo., 557; *Ayers vs. Hartford Ins. Co.*, 17 Iowa, 156; *The Howard Ins. Co vs. Bruner*, 11 Harris, 60.

In the fifth edition of *American Leading Cases*, 917, after a full consideration of the authorities, it is said that, "by the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers."—*Rowley vs. Empire Ins. Co.*, 36 N. Y., 550.

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval.

This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

The judgment of the Circuit Court is affirmed.

STATUTE LAWS.

MINNESOTA.

[Concluded from March Number.]

SECTION 26. Whenever a judgment for the recovery of money has heretofore been or hereafter may be recovered in any of the courts of this State or in any of the courts of the United States having jurisdiction in this State, against any insurance company or against any association, partnership, firm or individual engaged in the business of insurance, and holding a certificate of authority therefor from the State treasurer, under the laws of the State, or from the insurance commissioner under this act, and an execution thereon is issued and duly returned unsatisfied in whole or in part, and proof is made by any person, by filing with the insurance commissioner a certified transcript of the docket of such judgment, together with a certificate of the clerk of the court in the county where the judgment roll in said action is filed and the judgment therein is docketed, that an execution has been issued on said judgment to the proper officer of such county and returned unsatisfied, in whole or in part, with the date of issuing and return, the insurance commissioner shall forthwith revoke all authority or license for the transaction of any kind of insurance business within this State conferred upon such insurance company, association, partnership, firm or individual by any certificate therefor granted by said commissioner to such company, association, partnership, firm or individual under the provisions of this act, and shall withhold therefrom any new certificate of authority, such as is contemplated herein, until such judgment so docketed against such company, association, partnership, firm or individual, is wholly paid and satisfied, and proof thereof filed with such commissioner by the official certificate of the clerk of the court in the county where the judgment roll is filed and judgment docketed, showing that the same is satisfied of record, and until the expenses and fees incurred in the case under the provisions of this title are

also paid by such company, association, partnership, firm or individual; and the insurance commissioner shall also forthwith cause notice of such revocation of authority to be published in some daily newspaper printed and published at the capital of the State, for at least one week; and during the time such authority or license remains so revoked it shall be unlawful for the company, association, partnership, firm or individual, holding such revoked certificate of authority, or any of its agents or officers, to issue or renew any policies of insurance, take any risks, or transact any business relating to insurance, except such as is absolutely necessary in closing up its affairs in this State.

§ 27. All duties heretofore required to be performed by, or responsibility imposed upon the State treasurer of this State, under the existing laws regulating insurance companies, shall hereafter be performed by the insurance commissioner, so far as such duties and responsibilities are not changed, modified or repealed by this act.

§ 28. All insurance companies doing business in this State, under the provisions of this act, shall annually, at the time the certificate of authority is granted, pay the Treasurer of State two per cent. on all premiums received in cash and other obligations, except what are denominated insurance deposit notes, representing dividends of the company, by their agents or attorneys in this State during the year ending on the preceding thirty-first day of December, which sum shall be paid into the general revenue fund, and shall be in lieu of all other taxes or licenses to be collected from said companies in this State.

§ 29. Agents or employees of any insurance company doing business in this State, appointed or authorized to solicit for applications for insurance, to issue policies, to collect premiums on the same, to adjust losses, or to transact any other duties or business for such companies, shall be held personally responsible to such company for any moneys or property received by them for such company; and in case any such agent or employee shall embezzle or fraudulently convert to his own use, or shall take or secrete, with intent to embezzle and convert to his own use, without the consent of such company, any money or other property belonging to such company, which he shall have collected or which shall otherwise come into his possession, or shall be under his care or control by virtue of such agency or employment, or shall receive any consideration other than such allowed by the company, for which he is acting in the settlement or adjustment or payment of

a loss, with intent to defraud either said company or any insurer, he shall be deemed guilty of the crime of larceny, and on conviction therefor shall be subject to the fines and penalties provided by statute for the punishment of larceny.

If any person or persons insured in any company doing business in this State as provided in this act, shall wilfully make any false statement, under oath, in making any claim or proof of loss, as required by said company, they shall be deemed guilty of a felony and shall suffer the pains and penalties of perjury as provided by the laws of this State.

TITLE IV.

FIRE INSURANCE COMPANIES.

SECTION 1. No joint stock fire insurance company shall be organized in this State, or do business in this State, unless it has two hundred thousand dollars capital. No joint stock fire, inland or marine insurance company of any other State or nation shall do business in this State unless it has at least three hundred thousand dollars capital.

§ 2. No mutual fire insurance company, not of this State, shall do business in this State.

§ 3. No fire or inland insurance company of this State, or doing business in this State, shall expose itself to any loss on any one fire or inland navigation risk or hazard, either by one or more policies, to an amount exceeding five per cent. of its paid up capital, in the case of a fire, or ten per cent. in the case of an inland insurance company, whether reinsured or not.

§ 4. No fire insurance company shall make any dividend, except from the surplus profits arising from its business. In estimating such profits there shall be reserved therefrom:

1. A sum equal to the whole amount of premiums on unexpired risks and policies, which are hereby declared to be unearned premiums;

2. All sums due the company on bonds and mortgages, bonds, stocks, and book accounts, of which no part of the principal, nor the interest thereon, has been paid during the preceding year and for which foreclosure or suit has not been commenced, or which after judgment obtained thereon shall have remained more than two years unsatisfied, and on which interest shall not have been paid; and,

3. All interest due or accrued, and remaining unpaid; *Provided*, that any company may declare dividends not exceeding fifteen per

cent. on its capital stock in any one year, that possesses an accumulated fund in addition to the amount of its capital stock, and of such dividend, and all actual outstanding liabilities, equal to one-half of the amount of all premiums on risks not terminated at the time of making such dividend. Any dividend made contrary to this section shall subject the company making the same to a forfeiture of its charter, and each stockholder receiving it to a liability to the creditors of such company to the extent of the dividend received, beside the other penalties and punishments prescribed by law.

This section shall not apply to the declaration of scrip dividends by participating companies; but no such scrip dividend shall be paid, except from surplus profits after reserving all sums as above provided, including the whole amount of premiums on unexpired risks.

The word "year," wherever used in this section, shall be construed to mean the calendar year.

§ 5. Any joint stock fire insurance company may (upon the written consent of the holders of three-fourths in amount of the stock) permit the insured to participate in the profits of its business, and provide how far any scrip issued to the insured for such profits, shall be liable for the losses to be sustained; and any company so doing, whenever an amount not less than one hundred thousand dollars has been accumulated, and scrip so issued therefor, may, upon the written consent of the holders of three-fourths in amount of the stock, pay off and cancel an amount of the original cash capital equal to one-half of the accumulated profits, and so may continue from time to time until the whole amount of the original cash capital is paid off; provided, that before any portion of such capital stock shall be so paid off, proof shall be exhibited to the insurance commissioner that an amount of accumulated profits has been realized, scrip issued therefor, and investment made thereof, pursuant to the provisions of section 4 of Title III. of this act, at least equal to double the amount so desired to be paid off and canceled, and the said commissioner shall also first certify that he is satisfied with such proof.

§ 6. No fire insurance company of any other State of the United States, in which the substantial provisions of this act shall be enacted, shall be required to make any deposit in this State.

§ 7. No foreign fire insurance company shall do business in this State unless it has on deposit with the commissioner of this State, for the benefit of all its policy holders in the United States,

the sum of two hundred thousand dollars, invested and valued as prescribed in section 4 of Title III., or unless it has complied with the next section.

§ 8. A foreign fire insurance company, which has its principal office in the United States in any State where the provisions of law contained in this act shall be in force, may file with the insurance commissioner of this State a certificate, made by the insurance commissioner of such other State, that he holds a deposit made by such company, such as is described in the last section.

No deposit shall be required in this State from such company while the deposit so certified remains sufficient.

§ 9. No foreign insurance company shall make any contract of insurance against loss or damage by fire or inland navigation risks, nor expose itself to any such loss by any one risk, for any greater amount in proportion to its capital, as determined by the following provisions, than companies of this State may.

§ 10. For the purposes of this act the capital of any foreign insurance company doing fire insurance business in this State, shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State, and of the other States of the United States, for the benefit of policy holders in any such State, or in the United States, and its assets and investments certified according to the provisions of this act in the United States, after making the same deductions therefrom for losses and all liabilities within the United States, and for premiums on unexpired risks as are made in the case of companies of this State; provided, that such assets and investments be vested in and held within the United States by trustees, citizens of the United States, appointed by the board of directors of the company, and approved by the insurance commissioner of the State where invested for the benefit of the policy holders and creditors in the United States. The trustees so chosen are hereby empowered to take, hold, and convey real and personal property for the purposes of the trust, subject to the same restrictions as insurance companies of this State.

§ 11. The annual certificate of the insurance commissioner, given to any foreign fire insurance company, or its agents within this State, under section 8, must state the amount of capital of the company, ascertained by him as defined in the last section.

§ 12. All the provisions contained in this title respecting fire insurance companies, shall apply to companies doing an inland

insurance business, so far as, from the nature of the business of inland insurance, the same may be applicable.

§ 13. Any fire insurance company already organized under the laws of this State and doing a farm business only, may continue to do such business by possessing \$25,000 invested by deposits in national banks, or as provided in section 4, Title III, of his act, and comply with the other provisions of this act so far as applicable, but shall be exempt from complying with section 28, Title III, and section 3, Title II.

TITLE V.

LIFE INSURANCE COMPANIES.

SECTION 1. No life insurance company shall be organized or do business in this State unless it has at least one hundred thousand dollars capital or assets, invested as provided in this act.

§ 2. No life insurance company of this State shall do business in this State or elsewhere, and no other life insurance company, except as provided in section 13 of this title, shall do business in this State, unless it has on deposit with the insurance commissioner or other financial officer of this State, as security for all its policyholders, stocks or bonds of this State or of the United States to an amount the actual market value of which, exclusive of interest, shall never be less than one hundred thousand dollars, which stock or bonds shall be retained by the commissioner or other designated officer, and disposed of as directed by law.

Provided, however, that personal obligations, secured by first mortgages on real estate within this State, worth, exclusive of all buildings, at least double the amount of the lien, and bearing an interest of not less than six per cent. per annum, may be received by the said financial officer of this State instead of bonds or stocks, to the amount of not exceeding fifty thousand dollars.

§ 3. As long as any policies of the depositing company remain in force, the insurance commissioner shall hold the deposit mentioned in the last section as security for all holders of its policies.

§ 4. Any life insurance company of any other State of the United States in which the provisions of law contained in this act shall be in force, may file with the insurance commissioner of this State a certificate of the insurance commissioner of such other State, that as such officer, he holds in trust and on deposit, for the benefit of all the policy holders of such company the deposit above described, stating the items of the securities so held; and that he is

satisfied that such securities are worth one hundred thousand dollars. No deposit shall be required in this State while the said deposit so certified remains.

§ 5. When any life insurance company doing business in this State desires to relinquish its business, the insurance commissioner shall, on its application, under the oath of the president or vice president, and secretary or actuary, give notice of such intention in a public newspaper, published at the State capital, at least twice a week for six months; and after such publication he shall deliver up to such company or its assigns any securities held by him belonging to it, on being satisfied by the exhibition of its books and papers, and on examination, by himself or a person appointed by him, and upon the oath of the president or vice president and the secretary or actuary of the same, that all liabilities due or to become due, on any agreement made with any citizens of the United States, are paid and extinguished. And the commissioner may also from time to time, deliver up to such company, or its assigns, any part of said securities, on being satisfied by any other competent proof that all liabilities due or to become due on any agreement made by it, are less than one half the amount of the securities he still retains.

Any foreign life insurance company having made such publication, may, in the discretion of the insurance commissioner, withdraw one-half of its deposit of one-hundred thousand dollars, on registering, according to the provisions of law for registered policies, all its outstanding policies issued to citizens or residents of the United States, and covenanting to maintain unimpaired the reinsurance deposit for such registered policies at all future times, and specially pledging for their security all future premiums payable on American policies.

§ 6. Any life insurance company of this State may, at any time, assign to the insurance commissioner securities such as are described in section two (2), to the amount of twenty-five thousand dollars or more, in addition to the deposits required by that section, to be held by him in trust for the benefit of all holders of its policies and bonds registered under section seven (7), and not to be transferred by him without the written application of the company or its receiver, duly appointed, and for the purpose of paying such holders.

§ 7. Upon being furnished by the depositing company with policies and annuity bonds, consecutively numbered, executed by the company in duplicate, each bearing the words, "The present

net value of this policy is secured by pledge of public stocks or bonds and mortgages," and of such denominations and amounts as the company may require, within the limits prescribed by section six (6), the commissioner shall register the same in books provided for the purpose, and countersign, seal and deliver to the company the originals, and file the duplicates. Mutilated registered policies and annuity bonds, issued to a company, shall be received back by the commissioner and others delivered in lieu thereof, of like tenor and date. And in case of lost policies or bonds, he shall furnish certified copies of the duplicates on file.

§ 8. Receipts for renewal premiums on registered policies must be countersigned or stamped by the insurance commissioner; and no policies shall be marked off or cancelled on the books of a registering company except those the renewal receipts for which are returned to the commissioner, or other proof satisfactory to the commissioner is furnished, that they have not been taken or have ceased to be in force.

§ 9. The commissioner shall value the policies and annuity bonds chartered under the last section, according to the rules prescribed by section 3, Title II, and in no case shall the aggregate amount of the net value of said policies and bonds issued to any company exceed the value of the securities he holds by its transfer, as provided in section 3, Title V. He may, upon satisfactory proof presented in writing and filed with him, that the securities so held by him exceed the net present value of outstanding registered policies and annuity bonds issued to the depositing company, allow it to withdraw the excess.

§ 10. Nothing in this act shall be construed as implying any obligation on the part of the State to pay policies or annuity bonds of companies, except as to the net value thereof by a proper application of the securities deposited or transferred to the objects declared by the act.

§ 11. So long as any deposit required by this article is kept good, and the depositing company is solvent, the commissioner may permit the company to collect the interest or dividends on its securities so deposited; and from time to time to withdraw any such securities, on depositing with him others of equal value and like character.

§ 12. Any life insurance company, organized under a law of Congress, shall elect one State in which its policies shall be valued, and the certificate of the proper officer of such State that such has been done, shall be received by the commissioner of this State as

of the same force and effect as if such company had been organized under the laws of such State.

And such company shall comply with the law of the State so selected as regards the deposit required to be made therein for the protection of policy holders; and the certificate of the commissioner of such State that said deposit has been duly made, shall be received by the commissioner of this State as of the same effect as if said company had been organized under the laws of the State so selected.

§ 13. Life insurance companies doing business exclusively on the mutual plan are hereby exempted from the provisions of sections one (1) and two (2) of this title, and may do business in this State, provided they have on hand, exclusive of all debts and liabilities, the net value of all their policies in force, calculated as provided in subdivision four of section three (3) of Title II of this act, subject, however, to all other regulations and provisions of this act.

TITLE VI.

MARINE INSURANCE COMPANIES.

SECTION 1. No joint stock marine insurance company shall hereafter be organized in this State unless it has a paid-up capital of at least five hundred thousand dollars.

§ 2. No marine insurance company of any other State in which the substantial provisions of this act shall be enacted, shall be required to make any deposit in this State.

§ 3. No foreign marine insurance company shall do business in this State unless it has on deposit with the commissioner of this State the sum of four hundred thousand dollars invested and valued as prescribed in section four (4) of Title III, or unless it has complied with the next section.

§ 4. A marine insurance company of a foreign nation, which has its principle office for the United States in any State in which the substantial provisions of this act shall be enacted, may file with the insurance commissioner of this State a certificate made by the insurance commissioner of such other State, that he holds a deposit made by such company, such as is described in the last section.

No deposit shall be required in this State from such company while the deposit so certified remains.

§ 5. All acts and parts of acts and laws of this State, and now in force, inconsistent or in conflict with the several provisions of

this act are hereby repealed; but the repeal of such acts and laws shall not in any manner affect, injure or invalidate any vested rights of any insurance company, or any contracts, suits, rights, claims or demands, that may have been heretofore duly and lawfully issued, commenced, made, performed, or that may exist, in favor of or against any insurance company or other corporation, partnership, firm or person, under or by virtue or in pursuance of the said laws and acts, or any of them, but the same shall exist, be in force and carried out as fully and effectually, to all intents and purposes, as if this act had not been passed.

§ 6. This act shall take effect and be in force from and after its passage.

FLORIDA.

AN ACT relating to Insurance Companies.

The people of the State of Florida Represented in Senate and Assembly do enact as follows :

SECTION I. It shall not be lawful for any agent or agents of any insurance company incorporated by any other State than the State of Florida, nor for any insurance company organized under the laws of this State, or their agents, directly or indirectly, to take any risks or transact any business of insurance in this State without such company has first obtained a certificate of authority from the State Treasurer, and before obtaining such certificate such insurance company shall furnish the said Treasurer with a statement under the oath of the President or Vice President and Secretary of the company, showing,

First—The name and locality of the company.

Second—The amount of its capital stock and the amount paid up.

Third—The amount of its accumulations.

Fourth—The assets of the company including,

1st. The amount of cash on hand and in the hand of agents or other persons.

2d. The real estate unincumbered.

3d. The bonds owned by the company and how they are secured, with rates of interest thereon and schedule.

4th. Debts to the company secured by mortgage.

5th. Debts otherwise secured.

6th. Debts for premiums.

7th. All other securities.

Fifth—The amount of liabilities due or not due, banks or other creditors by the company.

Sixth—Losses adjusted and due.

Seventh—Losses adjusted and not due.

Eighth—Losses unadjusted.

Ninth—Losses in suspense, waiting for further proof.

Tenth—All other claims against the company.

Eleventh—The greatest amount insured in any one risk.

Twelfth—The act of incorporation of such company.

Thirteenth—The amount of gross receipts of such company in the State of Florida during the preceding year.

It shall be the duty of the board to cause to be prepared and to furnish to each insurance company printed forms of the statement required by this section. Such statement shall be filed in the office of said insurance company, [?] together with a written agreement under the seal of the company, signed by the president and secretary thereof, and agreeing, on the part of the company, that service of process in any civil action against such company, may be made upon any agent of the company in this State, and authorizing such agent, for and in behalf of such company, to admit such service of process on him, and agreeing that the service of process upon any agent shall be valid and binding upon the company as if made upon the president or secretary thereof.

§ 2. No insurance company, or agent or agents thereof, shall transact any business of insurance in this State, unless such company is possessed of at least one hundred and fifty thousand dollars in value invested in United States or State bonds, or other bankable interest bearing stocks of the United States at their market value. Upon complying with the preceding section, and upon furnishing evidence to the satisfaction of the board of insurance commissioners hereinafter provided for, that such company has actually invested the amount above stated in such securities as hereinbefore mentioned, the State treasurer shall issue a certificate thereof with authority to such company to transact the business of insurance in this State. Provided, that insurance companies organized under the laws of this State, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of said treasurer that such company is possessed of and has actually invested at least twenty-five thousand dollars in United States or State bonds, or other bankable interest-bearing stocks of the United States, at their market value, and by otherwise complying with the

provisions of this act. Provided, that insurance companies incorporated under the laws of this State, shall be exempted from the operation of this act until the next annual statement is required to be made. Provided, further, that life insurance companies organized under the laws of any other State shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of said treasurer that such company is possessed of, and has actually invested, one hundred thousand dollars in United States or State bonds or other bankable interest-bearing stocks of the United States, at their market value, or in mortgages on unincumbered real estate worth double the amount loaned thereon inclusive of buildings thereon.

§ 3. The State treasurer, comptroller and attorney general are hereby created a board of insurance commissioners, whose duty it shall be to examine into the affairs of any insurance company doing business or applying to do business in this State. And it shall be the duty of the officers or agents of such insurance company, at their own expense, whenever so required by the said treasurer, to cause their books to be opened for the inspection of said board, and otherwise to facilitate such examination as far as it may be in their power to do, and for that purpose the said board shall have power to examine, under oath, the officers or agent of any such company, relative to the business of, and securities possessed by, such company; and whenever the said treasurer shall deem it for the interest of the public so to do, he may publish the result of such examination in one or more newspapers of the State.

§ 4. Whenever any insurance company doing business in this State, upon a reasonable request of said treasurer, shall refuse to comply with any of the provisions of the foregoing section, and whenever it shall appear to the said board, upon such examination, that in their opinion the assets of any such company are insufficient, under the provisions of this act, to justify the continuance in business of any such company, or that the condition of such company is unsound, the board of insurance commissioners shall forthwith revoke the certificate of authority granted in behalf of such company, and shall cause a notification thereof to be published in some newspaper published at the capital, and such company, or the agent or agents of the same is, after such notice, required to discontinue the issuing of any new policy, and the renewal of any previously issued; and whenever it shall appear upon such examination that any insurance company, its officers or agents, have violated any of the provisions of this act, the

said board shall forthwith report the facts, with such statements and remarks as the board may deem expedient, to the attorney general, who shall at once prosecute said company, officer or agent.

§ 5. The State treasurer shall annually, in his report to the legislature, exhibit an abstract of all the returns and statements made and accepted under the provisions of this act during the year, with such other information in regard to the condition of the various insurance companies doing business in this State, as he may deem necessary for the public interest and he shall also within a reasonable time after the passage of this act, and annually thereafter in the month of February, publish in some newspaper published at the capital, a list of all insurance companies authorized to do business in this State, showing in a tabular form the assets, liabilities, and other essential data and information regarding the statements made and accepted under this act.

§ 6. The statement and evidences of investment required by this title shall be renewed annually, in the month of January, in each year. The first statement may be made at any time. The board, on being satisfied that the capital, securities and investments remain secure as at first, shall furnish a renewal of certificate as aforesaid, the certified copy of which, with the certified copy of the statement upon which the same was obtained, shall be filed, kept and published in the same manner, and be governed in all respects by the provisions of section one of this act.

§ 7. Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them as agent or agents of such company, or who in anywise, directly or indirectly, makes or causes to be made, any contract or contracts of insurance for or on account of such insurance company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all provisions, regulations and penalties of this act.

§ 8. Whenever a judgment for the recovery of any money has heretofore been or hereafter may be recovered in any of the courts of this State against any insurance company, or against any association, partnership, firm, or individual engaged in the business of insurance, and holding a certificate of authority therefor from the State Treasurer, under the laws of the State, and an execution thereon is issued and duly returned unsatisfied in whole or in part, and proof is

made by any person by filing with the State Treasurer a certified transcript of the docket of such judgment, together with a certificate of the clerk of the court in the county where the judgment roll in such action is filed, and the judgment therein is docketed; that an execution has been issued on such judgment to the proper officer of such county and returned unsatisfied in whole or in part, with the date of issuing and return, the State Treasurer shall forthwith revoke all authority or license for the transaction of any kind of insurance business within this State, conferred upon such insurance company, association, partnership, firm or individual by any certificate therefor, granted by said Treasurer to such company, association, partnership, firm or individual under the provisions of this act, and shall withhold therefrom any new certificate of authority such as is contemplated herein, until such judgment so docketed against such company, association, partnership, firm or individual is wholly paid and satisfied, and proof thereof filed with such State Treasurer by the official certificate of the clerk of the court in the county where the judgment roll is filed and judgment docketed, showing that the same is satisfied of record, and until the expenses and fees incurred in the case, under the provisions of this title, are also paid by such company, association, partnership, firm or individual, and the State Treasurer shall also forthwith cause notice of such revocation of authority to be published in some daily or weekly newspaper printed and published in the City of Tallahassee or Jacksonville, for at least one week, and during the time such authority or license remains so revoked it shall be unlawful for the company, association, partnership, firm or individual holding such revoked certificate of authority, or any of its agents or officers to issue or renew any policies of insurance, take any risks or transact any business relating to insurance except such as is absolutely necessary in closing up its affairs in this State.

§ 9. Any person violating the provisions of this act within this State shall, upon conviction in any court of competent jurisdiction, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not more than six months, or both in the discretion of the court; and any company that wilfully makes false returns or statements, under the provisions of this act, shall be liable to a fine of not less than five hundred nor more than five thousand dollars.

§ 10. For the services required to be rendered by the provisions of this title the State Treasurer shall receive a fee of five dollars, to be paid by the companies for each statement made and accepted.

§ 11. This act shall take effect and be in force from and after its passage.

Approved February 27th, 1872.

MISCELLANEOUS.

INSURANCE INVESTIGATIONS.

Within a few months three special investigations have been called for on charges of fraud, which are regarded with interest in insurance circles and by the public generally, and which are here noted and recorded as events that are having marked effect upon the present and future status of life insurance. The importance of such investigations consists not so much in their frequency as their significance of the state of the public mind in regard to insurance.

The immense proportions, which the life insurance business has assumed have brought to the surface two disturbing elements—distrust of managerial administration, and the scramble for lucrative positions. The first is founded on the visible evidence of extravagance in management, the second on the principle that the *outs* are naturally at war with the *ins*. That public confidence has been shaken is painfully obvious, but the ultimate effect may be salutary in forcing insurance managers to restore the enterprise to its legitimate channels, and to conduct it on the most economical principles.

LIFE ASSOCIATION OF AMERICA.—This Association is now undergoing its fourth or fifth special examination. The present examination is held at the instance of the trustees of the New York department of the Association, and is conducted by the distinguished actuaries, Messrs. Wright, Homans and Bryant. These gentlemen spent a few days in St. Louis not long since, procuring materials for the examination directly from the office, and have returned to the East to complete their calculations and to make up the report.

EQUITABLE LIFE ASSURANCE SOCIETY.—Grave charges of fraud and extravagance having been made against the directors and managers of this society, by one of its policy-holders, LaRoy S. Gove, and extensively circulated by publication in a New York newspaper, the superintendent of the insurance department of New York was invited by the president of the Equitable to make an

"investigation of the condition, affairs, and transactions of the society." But the New York superintendent was unable to comply with this request at the time, owing to press of business in the office, and the matter was referred by the directors of the Equitable to Hon. Julius L. Clarke, commissioner of the Commonwealth of Massachusetts; Mr. Clarke having associated with himself ten business and professional gentlemen of high standing, proceeded to the examination. At the present writing the investigation is not finished, but "from the wide publicity given to these charges," the investigating council thought it best to report the results of the examination, so far as it relates to charges of wasteful expenditures, extravagant compensation of officers, improper loans, favoritism to the directors and their personal interests, in the building contract, and other charges of maladministration. On thirteen counts, covered by the report, they acquit the directors of blame, and conclude as follows: "The undersigned take great pleasure in bearing their unanimous testimony to the faithful and successful management, by the trustees and officers of the society, of the great trust reposed in them." It is announced by them that a supplemental report will be issued after their examinations into "the details of the management of the society from its foundation," and into "its assets and investments." The Massachusetts commissioner notified Mr. Gove of the pendency of the investigation, and desired him to appear as the accusing party. The associated investigators state that "Mr. Gove did not appear or offer any testimony to sustain his allegations." The people have great confidence in the Equitable, and it is very likely that the closest investigation into its management would, under any circumstances, only strengthen this confidence. It is not certain, however, that Mr. Gove was not fully justified in disregarding the summons of an *ex parte* and self-constituted commission. It does not appear that Mr. Gove was consulted in the constitution of the commission, but only that he was notified that a commission had been constituted, and he was summoned to appear before it and show cause for his allegations. Mr. Gove may have had good reasons for objecting to this method of procedure, which for aught that appears may have been so far in the interests, social or otherwise, of the accused, although the members composing the commission were "not policy-holders in the company," as in his opinion to render it improper for him to submit the questions at issue to their adjudication. It is not the first time that life insurance companies have done the same thing, but it is evident that the moral weight

of a verdict by a commission is very much diminished where the commission lacks the element of mutual election or consent.

THE MILLER INVESTIGATION.—The committee appointed by the New York Legislature to investigate charges brought by ex-commissioner Barnes against commissioner Miller, for malfeasance in office, have concluded their labors, and report, by majority, that they find the charges sustained to such an extent as to justify them in recommending his removal from office. The Legislature has not yet acted upon the recommendation, and it is alleged by some that the committee were influenced by political considerations, and as the recommendation was not unanimous it is likely that the subject will be fully discussed before final action is taken.

CONSOLIDATION.

The rapid expansion of insurance of late years caused a large number of companies to start into existence, which are hardly able to bear themselves up in the present lull of business. Some have given way already.

The most recent event of this character is the absorption of the Atlas Mutual Life Ins. Co. of St. Louis, by the St. Louis Mutual. The Atlas, finding itself impaired in available assets, and unable to comply with the requisitions of the Missouri law, was compelled either to sell out to some company that would assume its risks, or go into the hands of a receiver. After being in the market for a long time and declined by various companies, the St. Louis Mutual included, efforts were made by its friends to set it on its feet, by an issue of preferred stock, and it was currently reported for a while that the new stock had been subscribed, and that the company would go on upon its new basis. At length, however, being forced to succumb, negotiations with the St. Louis Mutual were opened, and a contract for reinsurance effected with that company. The reasons for this change on the part of the St. Louis Mutual, and the terms upon which the Atlas has been received have not been made public. But the facts, so far as they have transpired, seem to warrant the statement, that the realizable assets of the Atlas were deficient on a liability reckoned at a much higher rate of interest than the Missouri law requires, but that in consideration of the damage that would accrue to the cause of insurance by the failure of a life company, it was deemed best to make some sacrifice in order to avert the calamity.

The competency of a life company to transfer its risks to another company without the consent of its policy holders, is a point of some moment in a transaction of this character, yet it is hardly to be supposed that the Atlas policy holders will object to the transfer if their condition is thereby materially bettered by being brought under the charge of a solvent company. And if the policy holders in the St. Louis Mutual consent to the assumption of the Atlas liabilities, then there is nothing to be said by way of questioning the propriety of the transaction. But it does not appear that they were consulted or even informed of the terms upon which the contract of reinsurance was based. How then do the rights of the St. Louis Mutual policy holders stand affected? What if they or any one of them should make objection to it, would the reinsurance be valid? We are not pronouncing an opinion upon the subject, but as consolidations are likely to become very common hereafter, it is well that the question should be considered before very serious complications are entered into.

In addition to this are there not some things in the present status of the St. Louis Mutual, which seriously affects the propriety of the assumption of the liabilities of a company whose assets are seriously impaired?

The solvency of the St. Louis Mutual is above suspicion, yet its condition is not in all respects as flattering as its friends desire. A few years ago it was compelled to withhold a dividend on account of large losses by epidemics at the South, and unfortunately an excess of mortality during the last year has compelled the company to do the same thing during the current year, and they have notified their patrons accordingly.

The wisdom of the managers of this large and prosperous institution, in adopting this course, is worthy of the highest commendation, and is the strongest guaranty that its financial administration will be faithfully conducted by them. There is, however, another fact to be considered; the impression has gained currency in some quarters that the ambition of the St. Louis Mutual, as was also the case with the Equitable in New York, overreached itself in undertaking the erection of the structure which stands on the corner of Sixth and Locust streets, in the City of St. Louis; and that the extraordinary lapse in the old business in that company, which took place during the last year, may have been owing in part to the feeling that the company was spreading itself more broadly than is compatible with its fiduciary character. The above named facts naturally suggest the doubt whether the St.

Louis Mutual Insurance Company was in a fit condition to carry the liabilities of the Atlas without complete reinsurance indemnity, although they are not sufficient to destroy the confidence that the managers of the company have acted with a full consideration of the financial bearings of the act.

CASES REPORTED.

A full report of the decisions in four insurance cases is given this month.

The opinion in *Hamilton vs. the Mutual Life Ins. Co.*, of New York, was rendered in the United States Circuit Court, for the Southern District of New York. The suit was brought on a life policy issued to a citizen of Alabama, prior to the war. No premiums were paid for several years prior to the death of the party, which occurred about the close of the war. The questions raised relate to the effect of the war upon contracts; the effect of non-payment of premiums during the war; the withdrawal, by the company, of its agencies in a seceding State; the right of a State to legislate in regard to insurance companies organized out of the State, &c., and are similar to those in *The Manhattan Life Ins. Co. vs. Warwick*, decided in the Court of Appeals of New York, and reported on page 115 of the JOURNAL. The doctrines held in this case and also in *New York Life Ins. Co. vs. Clopton*, 7 Bush. 179, are affirmed, and judgment is given in favor of the plaintiff.

The case of *Bobbitt vs. The Liverpool & London & Globe Ins. Co.*, was a suit upon a fire policy for \$20,000. The judge in the court below, instructed the jury that the application, which was referred to in the policy, as the basis of the contract was no part of the contract, but a mere representation. The policy was issued at the instance of the plaintiff and owner of the property, to and in the name of his agent, and it was contended that the plaintiff had no insurable interest. The Supreme court holds that the instruction of the judge was erroneous, and that the plaintiff had an insurable interest. This court also holds that it was sufficient to avoid the policy if the description in the application was false, however honestly made. This decision was rendered in the Supreme Court of North Carolina.

In *Woods vs. Atlantic Mut. Ins. Co.*, in the Supreme Court of Missouri. The points raised related to the breach of warranty in the description of the property, and as to what were proper questions for the jury.

The decision in *The Union Mutual Life Ins. Co. vs. Wilkinson*,

was rendered, during the present month, in the United States Supreme Court, on a writ of error from the District of Iowa. This opinion affirms the important doctrine, contained in several recent decisions, in regard to the responsibility of insurance companies for the acts of their agents, done in preparing the application for the assured, and in making the contract, and the court holds that the companies cannot protect themselves under instructions to their agents, that they are only agents for the purposes of receiving and transmitting the application and premiums. In this case the agent had inserted in the application, without the assent of the assured, a representation of the age of her mother, at the time of her death, which he had obtained from a third person, and which was untrue. The court hold that it was the act of the company and not of the assured, and that it did not invalidate the policy. The person assured had been a slave. The judgment of the Circuit Court, in favor of the plaintiff and against the company was affirmed.

INSURANCE LEGISLATION.

FLORIDA.—This act seems to be intended as a general law upon the subject of insurance. Provisions are made for the formation of a kind of insurance department. The State Treasurer, Comptroller and Attorney General of the State are constituted a Board of Insurance Commissioners, whose duty it is to examine into the affairs of any insurance company doing business or applying to do business in the State. This Board has power to revoke any certificate of authority, whenever it shall appear to them, upon an examination, that the company is unsound, and to report any violations of the law to the Attorney General, for prosecution.

It is made the duty of the State Treasurer to issue certificates of authority to insurance companies to do business in the State. He is also required to make an annual report to the Legislature, and annually to publish in a newspaper, published at the capital of the State, a list of all insurance companies authorized to do business in the State, with their assets, liabilities and other important data given in their annual statements. His fees are simply five dollars, to be paid by companies, for filing their statements.

All insurance companies, whether organized in the State or not, are required, before transacting any insurance business in the State, to obtain a certificate of authority to do such business from the State Treasurer, to be renewed annually. Each company is required, before obtaining such certificate of authority, to file with

the State Treasurer a statement setting forth, in specified detail, the condition and affairs of the company. This statement is to be renewed annually. The company is also required to file an agreement that service of process, in any civil action, may be made upon any agent of the company in the State.

Insurance companies not organized in the State are required to have at least \$150,000 invested in United States or State bonds; and companies organized in the State are required to have \$25,000 invested in like manner. Life insurance companies from other States are, however, only required to have \$100,000 invested.

Whenever a certificate is filed with the State Treasurer that a judgment has been obtained against any insurance company, and that an execution upon it has been returned unsatisfied, he is required to revoke the certificate of authority to the company, after which it is unlawful for the company to transact business in the State.

This act is hardly comprehensive or minute enough to meet the requirements of a general insurance law. The provision requiring the State Treasurer to publish, annually, the abstract of his report in a general newspaper, is a good one. The one relating to the amount of capital required of life insurance companies from other States, and the kind of securities in which their capital is to be invested, gives little protection to policy-holders.

JOHN P. THOMPSON.

A few years ago there appeared in the City of St. Louis a man of bland and youthful aspect, and of strikingly prepossessing manners, bearing the name of John P. Thompson, which, until very recently, was supposed to be his true name. Very soon this youthful stranger, by a winning manner and a magnetism peculiar to himself, gained access to the highest circles of wealth and commercial influence in the city, and became the projector of a life insurance company, which was started on a basis that was purely his own. By remarkable tact he enlisted a large amount of the best insurance talent in the city in the service of the new project, and with their co-operation induced a hundred persons, most of them leading men of wealth, to qualify as trustees, so called, of the proposed company by taking short endowment policies of \$10,000 each, on the ten annual payment plan, thereby securing to the company at the start \$1,000,000 of insurance, and an income the first year on these policies of \$71,000.

With this capital the company was organized and started into life full grown under the name of the "Life Association of Missouri;" the late John J. Roe, of St. Louis, being elected to the Presidency, and the said John P. Thompson to the office of Secretary.

The Secretary, in his new position, fully comprehending the risks and difficulties he had assumed, and that success or failure depended mainly upon himself, gave the entire power of his nature to the enterprise, and by the extraordinary fertility of his genius, he marked out for it a compass of action, which at once suggested the change of the name of the company from the "Life Association of Missouri" to the "Life Association of America." As the enterprise grew upon his hands, his inventive mind conceived the novel device of creating a vast system of State and subordinate branch boards, so constituted as to bring to its support the wealthy men of the country, each qualifying as a trustee by taking a policy of \$10,000 in the Association, these department boards to enjoy the dignity of representation in the general directory of the Association, to have exclusive control of the business within their several jurisdictions, and in connection with local boards to distribute the investments of the reserved funds to which their business entitled them, within their own territory, features which, while they were new and so long as the commanding mind of their projector remained at the head, constituted an arm of prodigious power, although when passing into other hands, liable to wear out by natural exhaustion, and to become a source of insecurity and danger.

Every one who was familiar with the office of the company in its early days knows that the presence of Thompson in the rooms of the Association, although his movements were as quiet as the still evening, was an inspiration that sent a wonderful magnetic influence through all its lines of action, and that along these lines the impulses of that master mind were telegraphed over almost the entire country. The growth of the Association was without precedent in the annals of insurance. By the force of his executive talent and the novelty of his plan, Thomson had, in an incredibly short time, enlisted in its service the wealth, influence and energy of nearly all the States of the West and South, and it was apparent that soon nothing would be able to resist his triumphal march. This unexampled success immediately called forth bitter opposition from the older companies and the most violent persecution, the burden of which fell upon the head of Thompson, the central idea of the Association, and without whom

it would have shrunk to feeble dimensions. He was publicly charged as an adventurer, an imposter, a bankrupt, and a vagrant, who had fled his country in disguise, and under a false name had artfully contrived to work his way to the confidence of the capitalists of St. Louis. Thompson at once comprehended the situation and resigned the office of Secretary, candidly laying before the Executive Committee the facts of his history and his reasons for going under an assumed name. The committee were so far satisfied that, although his resignation was accepted in compliance with his wishes, it was yet understood that the management of the company would remain in his hands. From that time he, of his own choice, never had any official station in the Association, but was unofficially its Prime Minister, and a greater power in its internal and external action than all others together. The officers and managers of the Association were as plastic putty in his hands, not by any arbitrariness of will, for that was not his leading quality, but by his serene and persuasive power and the comprehensiveness of his genius. There was a magnetic omnipotence in his person, which ruled, without appearing to rule, the entire circle of his associates. He had the respect of all as a man of unequalled fertility of mind, and effective but quiet energy, and even those, who since his severance from the institution have undertaken to bear the yoke, which was easy to his neck, have already learned that a system such as only the genius of Thompson was able to devise and execute, needs brains for its successful administration. Local boards, however reliable, when in a healthful condition, are poor agents for managing business, or handling and investing life insurance funds, when the boards enter upon a process of decay, a process, which is sure to take place so soon as the administration at the home office becomes enfeebled.

Thompson, however, like most other men, committed mistakes, yet unlike many he was quick to discover their bearing and to retrieve their consequences. During all the perilous times through which he had conducted the Association, he was constantly on the alert, as expert in discovering expedients for the correction of false steps as for meeting any new tactics adopted by his enemies. At length, however, passing over much intermediate history, he committed an error which was the cause of dissevering him from the company in a manner, which was neither pleasant to himself nor generous on the part of the Association, considering the credit that was due to him for previous services. In his ambition—for he was ambitious in the highest sense—he allowed himself to be

placed in the unfortunate attitude of a leader in an attempt to procure the passage of an act by the Missouri Legislature, which met with violent opposition from without, and was finally defeated on account of its being supposed to be in the exclusive interest of the Life Association, and containing some provisions, which were regarded with suspicion. Thompson felt the defeat very keenly, the more because it culminated in the alienation of those, who had relied upon him in the troubles through which he had guided the Association with such consummate skill and ability, and because of the readiness with which the opportunity was embraced to separate him from the child of his own begetting. He however quietly withdrew, with the composed dignity that had always characterized his demeanor and returned to his native country, and having honorably satisfied his foreign creditors, he is now established in London, doing business in his true name as Wm. B. Corder.

The man has passed away, and the inspiration of that presence which once was a vitalizing influence wherever the shadow of it fell, is felt no more in the rooms where he was long accustomed to move in the quiet dignity of conscious yet unobtrusive sovereignty.

BOOK NOTICES.

THE PRINCIPLES AND PRACTICES OF LIFE INSURANCE. By Nathan Willey, Actuary.

This treatise issues from the office of the "Spectator," under the imprint of J. H. & C. M. Goodsell, Publishers, by whom it is copyrighted. The author, however, is Nathan Willey, Actuary, who is personally entitled to the credit of having collated and arranged the material of the work as well as of having made many of the computations. Although not making pretensions to original discussion of the problems of life insurance, yet as a compilation of the results that have been reached by leading actuaries, the completeness of the work, its arrangement and the clearness of its explanations, deserve to be noted as reflecting credit upon the author, and as fulfilling the purposes for which it was undertaken. Within the small compass of 175 pages, it is a thesaurus of all the formulæ and tabular computations that are ordinarily wanted by agents and others, who are interested in the mathematical basis of insurance. The computations are based upon $\frac{1}{4}$ and $4\frac{1}{2}$ per cent. and appear to be reliable, so far as they have been tested by comparison with other tables. The only typographical errors we discover are on page 51, 9 for 6; p. 90, 4 for $4\frac{1}{2}$, and on p. 152, a letter u for n.

THE Hon. William Barnes has resigned his position as consulting actuary of the Life Association of America. The resignation of Mr. Barnes has been brought about by the unpleasant complications in which that company has become involved by his connection with the recent prosecution of Mr. Miller, Superintendent of the New York Insurance Department.

THE State of Iowa has just abolished capital punishment, and all crimes heretofore punishable with death, are hereafter to be punished by imprisonment for life at hard labor in the State penitentiary, and pardons are only to be granted in such cases by the Governor on recommendation of the General Assembly.

HON. WYLLYS KING, Superintendent of the Insurance Department of Missouri, died on the 29th inst., at St. Louis. Mr. King was universally esteemed for his private virtues, and for unimpeachable probity in all business relations, and in the official positions he had been called to fill.

THE Legislatures of Wisconsin and Missouri, at their late sessions, adopted measures for amending the constitutions of those States, so as to increase the number of the Supreme Court Judges from three to five.

JOSIAH H. KELLOGG, Esq., has recently been appointed actuary of the insurance department of Illinois. Mr. Kellogg is a graduate of West Point, and was for some time an assistant professor in that institution.

THE legislature of Mississippi has incorporated a co-operative insurance company—the “Co-operative Life Association of Mississippi.”

THE Atlas Mutual Life Ins. Co., of St. Louis, has reinsured its risks in the St. Louis Mutual Life, and retired from business.

J. W. FOARD, Esq., has been appointed Insurance Commissioner of California, in place of the Hon. Geo. W. Mowe, resigned.

THE Minnesota insurance law passed the House by a vote of 88 to 5. The law was approved February 29th.

A PROMINENT lawyer in the Granite State, was trying a case last fall, when a question arose which required the summoning of a farmer from his field, where he was engaged in gathering pumpkins. The lawyer cross-examined and brow-beat the witness for several hours, until he completely lost his own temper, but without in the least disconcerting the witness. The lawyer, whose head was bald, with a rim of fiery red hair, not altogether unlike the richness of a pumpkin, wore a high dickey, stiffly starched, one side of which, in his excitement, he had somehow doubled down. When the witness was dismissed, he slowly walked from the witness stand, and as he came opposite the lawyer, he turned to him and said, in a slow, drawling manner, "I say, 'squire," (pointing to the flattened dickey,) "if you don't put up that tail-board, that punkin of your's will roll out."

A CURIOUS story is told illustrating the legal precision of a great judge. He asked a magistrate, on a circuit dinner, whether he would take some venison. The gentleman answered, "Thank you, my lord, I am going to take boiled chicken." Lord Tenterden replied: "That, sir, is no answer to my question. I ask you again if you will take venison, and I will thank you to answer yes or no, without further prevarication."

AN agent of a life insurance company in New York, called on a gentleman for the purpose of insuring his life, and on asking him whether he was not desirous of taking out a policy, was met with the reply, that if the company could insure him in the future state he would take one. The agent replied that he was sorry to say his company was prevented by its charter from issuing fire risks.

A GOOD instance of "sharp practice" is that of a man in Ohio, who was acquitted of murder on a plea of insanity. He had secured his lawyers by giving them a mortgage on his farm, but now repudiates the mortgage on the ground that he was insane when he made it, according to the showing of these same lawyers.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

AGENT.

§ 168. LIFE.—*Responsibility of Company for Acts of—Application.*—By the terms of the policy it became void if any of the representations in the application proved to be untrue. The application contained an inquiry as to the age of the mother of the assured, the wife of the applicant, at the time of her death, and the disease of which she died. The agent of the company took down the answers of the applicant and his wife to the interrogatories in the application, and was told by them both that they knew nothing about the cause of the mother's death or her age at the time. The agent then questioned an old woman, who was present, and from what she told him filled in the answer that she died at forty, of a fever, neither the applicant or the wife affirming or assenting to the truth of the statement. The applicant did not know at the time how the answer had been

filled in. The mother died at the age of twenty-three. *Held*, that "the powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations, not communicated to the person with whom he deals."

Beebe vs. Hartford Ins. Co., 25 Conn., 251; *The Lycoming Ins. Co. vs. Shollenberg*, 8 Wright, 259; *Beal vs. The Park Ins. Co.*, 16 Wis., 241; *Davenport vs. Peoria Ins. Co.*, 17 Iowa, 274.

Held, also that "An insurance company establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal."

Saving Bank vs. Charter Oak Ins. Co., 31 Conn., 517; *Horwitz vs. Equitable Ins. Co.*, 40 Mo., 557; *Ayers vs. Hartford Ins. Co.*, 17 Iowa, 156; *The Howard Ins. Co. vs. Bruner*, 11 Harris, 60; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550.

Held, also that the court below properly instructed the jury that "if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others, in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years."

Union Mutual Life Ins. Co. vs. Wilkinson.*

Rep'd Jour'l p. 607.

Mo. S. C.

ASSIGNMENT.

§ 169. FIRE.—*By Operation of Law*.—The defendant insured his buildings, in his own name and for his own benefit. Afterwards the plaintiff brought suit, and by levy of execution, acquired title to the premises. Subsequently to this, the buildings were destroyed by fire. *Held*, that the title to the premises gave the plaintiff no legal or equitable claim to the in-

* Decision rendered March 25th, 1872.

surance, and that he is not entitled to the whole or any part of the proceeds of said insurance. *Held*, also, that "the contract of insurance is in general confined to the parties, and as a general principle, no other person has any right, in law or equity, to the proceeds, unless a legal or equitable right thereto has been created by contract with a third person; or by some act of the insured, those proceeds have been clothed with the character of real estate, or with a trust in favor of a third person."

*Plimpton, Ex'r, vs. Farmers' Mutual Fire Ins. Co. et al.**

Rep'd Jour'l p. 678.

Vt. S. C.

COMMON CARRIER.

§ 170. FIRE.—*Relation of Common Carrier, Owner and Insurer—Subrogation.*—The plaintiffs delivered to the defendant a lot of cotton to be transported from Chattanooga to Nashville, and insured the same against loss by fire, while in possession of the defendant, as common carrier, in two insurance companies. The cotton was accidentally destroyed by fire, while in the possession of the defendant, and the insurance companies paid the plaintiffs the value thereof. The suit was brought in plaintiffs' names for the use of said insurance companies. *Held*, that "as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction, is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability;" that "in respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier, for a breach of his contract, or for non-performance of his legal duty;" and that, "standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured, in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the

* Decision rendered February Term, 1871. To appear in 43 Vt.

means of indemnity which the satisfied owner held against the party primarily liable." *Held*, also, that the right of the insurer rests upon "the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence, it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier, whose failure of duty caused the loss," and that there is "no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea, which does not exist in support of a like subrogation in case of an insurance against fire on land."

Phillips on Ins., § 1,723; *Gales vs. Hailman*, 11 Penn. St., 515; *Hart et al. vs. The Western R. R. Co.*, 13 Met. Mass.; *Rockingham Mutual Fire Ins. Co. vs. Boshier*, 39 Me., 253; *Peoria Ins. Co. vs. Frost*, 37 Ill., 333; *Conn. Mut. Life Ins. Co. vs. N. Y. & N. H. Railroad Co.*, 25 Conn., 265. And such is the English doctrine, settled at an early period. *Mason vs. Sainsbury*, 3 Dougl., 60; *Yates vs. Whyte*, 4 Bingh., N. C., 272; *Clark vs. Blythiny*, 2 B. & C., 254; *Randall vs. Cockran*, Ves. Sen. 98.

*Hall et al. vs. the Nashville & Chattanooga R. R. Co.**

Rep'd Jour'l p. 669.

U. S. S. C.

§ 171. FIRE.—*Responsibility of.*—The plaintiffs delivered to the defendant a lot of cotton to be transported from Chattanooga to Nashville. The cotton was accidentally destroyed by fire, while in the possession of the defendant. *Held*, that the defendant was responsible for the loss, and that "when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils."

Hall et al. vs. The Nashville & Chattanooga R. R. Co.

—§ 170.

CONSTRUCTION.

§ 172. LIFE.—*Personal Injury.*—By the terms of the policy, it became void if any of the representations in the applica-

* Decision rendered March 4th, 1872.

tion proved to be untrue. The application contained the following question: "Has the party ever had any serious illness, local disease or personal injury, if so, of what nature, and at what age?" The parties answered, "No." The party assured had been injured by a fall from a tree, five or six years before the application was made. *Held*, that the court below properly instructed the jury that "if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect her health or shorten her life, then the non-disclosure of the fall is no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent."

Union Mutual Life Ins. Co. vs. Wilkinson.

—§ 168.

ESTOPPEL.

§ 173. *LIFE.—Parol Testimony and Written Contracts.*—By the terms of the policy it became void if any of the representations in the application proved to be untrue. The application contained an inquiry as to the age of the mother of the assured, the wife of the applicant, at the time of her death, and the disease of which she died. The agent of the company took down the answer of the applicant and his wife to the interrogatories in the application, and was told by them both that they knew nothing about the cause of the mother's death or her age at the time. The agent then questioned an old woman, who was present, and from what she told him, filled in the answer that she died at forty, of a fever, neither the applicant or the wife affirming or assenting to the truth of the statement. The applicant did not know at the time how the answer had been filled in. The mother died at the age of twenty-three. The defendant excepted in the court below to the introduction of oral testimony regarding the action of the agent, on the ground that it permitted the written contract to be contradicted and varied by parol

testimony. *Held*, that when through accident, mistake, or fraud, the written instrument does not represent the intention of the parties, it may be set aside or reformed, and that the doctrine of equitable estoppels or estoppels *in pais*, is applied by courts of law as well as equity, in precisely such cases as this, where the technical advantage thus obtained is set up and relied on to defeat the ends of justice, or establish a dishonest claim.

Plum vs. Cataraugus Ins. Co., 18 N. Y., 392; Rowley vs. Empire Ins. Co., 36 N. Y., 550; Woodbury Saving Bank vs. Charter Oak Ins. Co., 31 Conn., 526; Combs vs. The Hannibal F. & M. Ins. Co., 43 Mo., 148.

Union Mutual Life Ins. Co. vs. Wilkinson.

—§ 168.

INSURABLE INTEREST.

§ 174. *LIFE.—Policy—Indemnity.—Held*, that "the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured, and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured."

Dolby vs. The India and London Ins. Co., 15 C. B., 365; Loomis vs. Eagle L. & H. Ins. Co., 6 Gray, 396; Lord vs. Dall, 12 Mass., 118; Trenton L. & F. Ins. Co. vs. Johnson, 4 Zab., 576; Rawls vs. American L. Ins. Co., 36 Barb., 357; same case, 27 N. Y., 282.

"Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract, as the contract is not merely for indemnity, as in marine and fire policies."

*Phoenix Mutual Life Ins. Co. vs. Bailey.**

Rep'd Jour'l p. 658.

U. S. S. C.

* Decision rendered Dec. 11th, 1871.

§ 175. FIRE.—*Ownership—Trust*.—The Company, by its policy, agreed to insure the plaintiffs against loss or damage by fire, to the amount of \$3,000, on refined carbon oil and packages containing the same, their own, or held on trust, on commission, or sold but not removed, contained in bonded warehouse. Previous to the fire, the plaintiffs had sold the oil and received their pay, and by the delivery of invoices and guagers' certificates, there had been a complete delivery, according to the custom of the trade. But the place of storage had not been changed. It remained where it had been deposited by the plaintiffs, without expense to the vendees. *Held*, that "it is not forbidden by the law that a policy should be so framed as that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risk, shall become, in turn, the parties really insured."

2 Duer on Ins., 49; Lecture 9, § 31.

"Agents, commission merchants or others, having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer, not only a sum equal to their own interest in the property, by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property."

See *De Forest vs. Fulton Ins. Co.*, 1 Hall S. C. Rep., 84; *Stillwell vs. Staples*, 19 N. Y., 401; *Siter vs. Motts*, 1 Harris, Penn. St. R., 218.

And *Held*, that "it must be made to appear that the owner was in the intention of the person effecting the insurance, when the contract was made. Such intention need not have fastened, at the time of entering into the contract, upon the very person, who, when the contract matures, seeks to take the benefit of it." And that "it is to be assumed that every one was in the intention of the insurer, who subsequently, with design, takes such relation to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons, who, during the running of the policy, should have goods within the description of property insured." *Held*, also, that the policy "was meant to cover that which had been sold, and of which a legal, binding delivery had been made;

the ownership and right of control of which had passed, but which had not been in fact removed; of which no change of place indicated change of ownership and possession," and that though the action is in the names of the persons named in the policy, their recovery will be in trust for the vendees.

*Waring et al. vs. The Indemnity Fire Ins. Co.**

Rep'd Jour'l p. 672.

N. Y. C. A.

POLICY.

§ 176. FIRE.—*Avoidance of—Punctuation—Gunpowder.*—The policy contained the following clause: "Or if gunpowder, phosphorus, saltpetre, naphtha, benzine, benzine varnish, benzole, petroleum, or crude earth oils, are kept on the premises, or if camphene, burning fluid, refined coal or earth oils, are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time, without written permission, or endorsed upon the policy; then, and in every such case, this policy shall be void." A number of causes, which should operate to avoid the policy, were set forth in the policy, and these causes were all embodied in separate clauses, each class being separated from the others by a semi-colon. *Held*, that "if there were in the clause in dispute a semi-colon where the word premises is first used, it may be, in view of the punctuation adopted in reference to the other clauses, that this clause would be complete in itself, and exclude wholly from the premises gunpowder, saltpetre, and the other articles in the same class. But in the absence of the semi-colon, it is manifest that no greater restriction can be applied to gunpowder and saltpetre than to camphene and burning fluid, and that therefore the words "in quantities exceeding one barrel at any one time," are applicable alike to all the materials which are specified in the clause in controversy."

The Phoenix Ins. Co. vs. Slaughter et al.†

Rep'd Jour'l p. 696.

U. S. S. C.

PRACTICE.

§ 177. LIFE.—*Equity Jurisdiction—Policy.*—The appel-

* Decision rendered Dec. 11th, 1871. To appear in 45 N. Y.

† Decision rendered Nov. 27th, 1871.

lants instituted a suit in equity in the Supreme Court of the District of Columbia, to enjoin the appellee from assigning or in any manner disposing of two policies of insurance, and also praying that she might be compelled to deliver up the policies to be cancelled. The policies were issued by the appellants upon the life of the husband of the appellee. The husband died after the policies were issued, and due notice and proof of death was furnished the appellants, who refused to pay on the ground of fraudulent misrepresentations and fraudulent suppression of material facts. *Held*, that jurisdiction may be exercised by courts of equity "to rescind written instruments in cases where they have been procured by false representations, or by the fraudulent suppression of the truth, if it appear that the rescision of the same is essential to protect the opposite party from pecuniary injury." *Held*, also, that whenever a court of law "is competent to take cognizance of a right, and has power to proceed to a judgment, which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed in law, because the defendant, under such circumstances, has a right to a trial by jury."

Foley vs. Hill, 1 Phillips, 399; same case, 2 H. L. Cas., 28; Fire Ins. Co. vs. Delavan, 8 Paige, Ch. R., 422; Alexander vs. Muirhead, 2 Dessa, 162; 5 Am. L. Reg., 564.

Held, also, that "suits in equity, the judiciary act provides, shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the Chancery Court of this District."

Hipp vs. Babin, 19 How., 271; Parker vs. Lake Co., 2 Bl., 545; Boyce's Ex'rs. vs. Grundy, 3 Pet., 210; Graves vs. Ins. Co., 2 Cran., 444; 1 Stat. at Large, 82.

Held, also, that where the party, upon whose life the policies were issued, has died, and due notice has been given and proof of loss furnished, and the obligation to pay has become fixed, by the terms of the policy, and the sums insured have become a purely legal demand, and nothing appears to show that the defense at law may not be as perfect and complete

as in equity, a suit in equity will not be sustained, and that the decree of the court below dismissing appellant's bill be affirmed.

Phoenix Mutual Life Ins. Co. vs. Bailey.

—§ 174.

STATUTES.

§ 178. FIRE.—*Certificate of Authority—State Auditor.*—The statute provided that "before the Auditor shall issue any certificate of authority, or any renewal of the same, the corporation or its agent shall pay into the State Treasury for the support of common schools, the sum of fifty dollars." On the 25th of February the Auditor issued his certificate of authority to the company; gave his receipt for \$50 and his fees, and drew on the company his draft payable on sight. The draft was paid on presentation, and on the 21st of March the money was received by the Auditor, and was by him paid into the State Treasury. The Auditor had no authority by law to collect money. The action was against the company for doing business in the State without a certificate of authority. *Held*, that until the money was paid into the treasury, the Auditor had no power under the law to issue the certificate of authority, and that "if the corporation chose to pay this through the Auditor, then for that purpose he was the agent of the corporation, and not of the State, and until the money reached the State Treasury, it was under the control of the corporation, and not of the State," and that "because of the non-payment of this money, the certificate itself was void, and presented no defense to the action."

*Hartford Ins. Co. vs. State of Kansas.**

Rep'd Jour'l p. 682.

KAS. S. C.

* Decision rendered April 23d. 1872. To appear in 7 Kas.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

SUPREME COURT OF MISSISSIPPI,

APRIL TERM, 1872.

Appeal from Warren County Chancery Court.

THE PHENIX INS. CO. *et al.*, Appellants, }
vs. }
HOFFHEIMER BROS. & CO., Appellees.* }

A court of equity has authority to reform a contract when there has been an omission of a material word or stipulation by mistake, and a policy of insurance is within the principle.

Equity will relieve against mistake as well as fraud in a deed or contract in writing, and parol evidence is admissible to prove the mistake. The relief will be granted not only when the fact of the mistake is expressly established, but is fairly implied from the nature of the transaction.

Decision in *Oliver vs. M. C. Marine Ins. Co.*, 2 Curtis' Rep., 291, affirmed: "If one who applies for insurance makes known that he is an agent only, and the company agrees to effect the insurance, it is a necessary implication that such words shall be inserted in the policy as are usually inserted in such cases, and as are necessary to make a binding contract."

Where the agent procuring the insurance stated to the agent of the company, at the time of taking out a former policy, that he was doing business as agent of the appellees, and the policy was issued to him as such agent, and afterwards requested the same agent to make another policy as the first was made out, and took it for granted that the agent had done so, *Held*, that this was a reasonable confidence, and that it was competent for the court below to correct and reform the policy, made on the agent's own account, in such manner as to cover the interests of the appellees, and to render judgment for the appellees upon the policy as reformed.

HARRIS & HARRIS, *for Appellants.*

U. M. YOUNG, *for Appellees.*

* Decision rendered April, 1872.

PEYTON, Ch. J.

On the 25th of May, 1868, Solomon Hoffheimer, Isaac Hoffheimer, Abraham Hoffheimer, John Meyer, Max Hoffheimer, and Moity Bachrach, partners in trade domiciled and resident at St. Louis, in the State of Missouri, negotiating under the name, firm and style of Hoffheimer, Bros. & Co., filed their bill in the Chancery Court of Warren county, against the Phoenix Insurance Company, to reform a policy of insurance against fire, and to enforce the payment of the amount insured.

The bill alleges that in the month of August, 1865, complainants started a mercantile business in the city of Vicksburg, in the State of Mississippi, for the sale of liquors, tobacco, groceries and other wares and merchandise, and put the same in charge of, and under the control and management of Philip Sartorius, as agent, at a fixed salary for his services in conducting said business. That in the months of August and September, in the year 1865, they supplied said Sartorius, agent, with a stock of goods, which was insured from time to time, during the latter part of the year 1865 and the year 1866. That on the 25th of September, 1865, the said Philip Sartorius, agent as aforesaid, applied to William A. Fairchild, for insurance against loss and damage by fire on the goods so kept by him for sale, to the amount of \$1,500, in and with the said Fairchild, as the legally constituted agent of the Ætna Insurance Company, a corporation doing business in said city of Vicksburg, Mississippi, through their said agent. That at the time the said Sartorius applied to said Fairchild, agent for said insurance company, he informed said Fairchild, agent as aforesaid, that he, the said Sartorius, held said merchandise, and was selling the same as agent for complainants, his principals, and owners of said merchandise. That said insurance company, through said Fairchild, their agent, on the said 25th day of September, 1865, issued to said Sartorius, agent, a policy of insurance, assuming a risk of \$1,500 against fire on said merchandise, for the period of three months, the said Sartorius, as agent, paying therefor the premium.

That said Fairchild was the agent of the Ætna Insurance Company, the Phoenix Insurance Company and the Hartford Fire Insurance Company. And that on the 19th of February, 1866, the first policy having expired, the said Sartorius applied to said Fairchild, agent of said Ætna Insurance Company, for another policy of insurance against fire, risk to the same amount, on the said goods and merchandise, to be issued in the same way with the former, to the said Sartorius, agent, who paid said Fairchild therefor the premium.

That at the issuance of the first policy, in September, 1865, the said Fairchild had notice and full knowledge of the facts, that the said goods and merchandise were the property of complainants; that Sartorius was their agent, and that the policy was for their benefit, and that said first policy was, in fact, issued to said Sartorius as agent of complainants, with the intent and for the purpose of protecting the interests of his principals in said goods.

That on the 19th of February, 1866, the said Fairchild, agent of the Phoenix Insurance Company, being instructed by said Sartorius, agent, to make out the policy then applied for in said company, like the first one made out by said Fairchild, agent, for said Sartorius, agent, in the Etna Insurance Company, and knowing that it should be filled up so as to make the same valid and effectual to cover the interest of complainants in the merchandise, did, at said time, issue a policy taking a risk of \$1,500 on said goods and merchandise, and received from said Sartorius, agent, the premium for the same, but by accident or mistake, the defendants, by their agent, Fairchild, omitted and neglected to insert in said policy, that P. Sartorius, agent, was insured. And that on the 19th of May, 1866, the said policy was renewed for nine months, which would expire on the 19th of February, 1867. That at the time the renewal was made, it was confidently relied upon and believed by said Sartorius, that said policy, which was continued by said renewal, covered and protected the interests of complainants in said merchandise, which was destroyed by fire on the 23d of December, 1866.

The bill prays that said policy of insurance and the renewal thereof, may be corrected and reformed by inserting therein that said insurance was made by P. Sartorius, agent, or of P. Sartorius, for whom it may concern, or of P. Sartorius, for account of complainants, or such other words as will cover and protect the interests of complainants in said goods, and that complainants may have the benefit of said policy of insurance so corrected and reformed, and that the sum so insured by said defendants on said goods and merchandise, be paid to them, and for such other or further relief as may be consistent with the facts of the case.

The defendants in their answer deny that P. Sartorius ever notified them or gave them any information that the complainants were the owners of the goods insured. They admit, as stated in the bill, that said Sartorius did business as "agent," both by publication and by his sign, but deny that they ever knew that he was in reality agent of

the complainants, as they supposed Sartorius adopted that mode of doing business for purposes of his own, and insist that he was the only person known to them in the transaction, and that the insurance was effected in his own name and on his own account.

Upon the final hearing of the cause on bill, answer, exhibits and proofs, the court decreed that the policy of insurance mentioned in the bill, be so corrected and reformed as to express the idea that said P. Sartorius was, by said policy, insured as agent, for and on account of complainants, so as to cover the interests of complainants in the goods insured by the policy of the defendants, and the court having corrected and reformed said policy as aforesaid, decreed that the defendants, the Phœnix Insurance Company, pay to the complainants the sum of \$1,500, with \$341.25 interest on the same, at 6 per cent., from the 1st day of April, 1867, to the date of this decree, and that the complainants have execution, &c.

From this decree the defendants appealed to this court, and assigned for error :

1. It was error to decree that the policy of insurance exhibited in the bill should be altered, changed or amended, as decreed.

2. It was error to decree the payment of money to be made by the appellants to the appellees, as decreed.

We will consider the errors assigned together, as they deny the right to reform the policy of insurance, and to enforce it as reformed.

The interposition of a court of chancery to correct mistakes by ordering a proper deed to be executed, according to the true intent of the parties, is a very ancient doctrine. If on inquiry, it appears that the instrument does not contain what the parties intended it should, and understood that it did, it may be reformed by proof *aliunde*, so as to make it the evidence of what was the true agreement between the parties. It is wholly immaterial from what cause the defective execution of the intent of the parties arose.

There cannot be any doubt that a court of equity has authority to reform a contract, where there has been an omission of a material word or stipulation, by mistake. And a policy of insurance is within the principle. But a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence. 1 Phillips on Ins., 72, and 2 Phillips on Ins., 560; Phœnix Fire Ins. Co. vs. Gunee, 1 Paige, 278. It would be a great defect in what Lord Eldon terms the moral

jurisdiction of the court, if there was no relief for such a case. The cases concur in the strictness and difficulty of the proof, but still they admit it to be competent, and the only question is, Does it satisfy the mind of the Court?

And the doctrine is well established in this country, that equity will relieve against mistake as well as fraud, in a deed or contract in writing; and *parol* evidence is admissible to prove the mistake, though it is denied in the *answer*, and this either where the plaintiff seeks relief, affirmatively, on the ground of mistake, or where the defendant sets it up as a defense, or to rebut an equity. *Gillespie vs. Moon*, 2 John, Ch. 585; *Willman vs. Wright*, 9 Ind., 126, and *Davidson vs. Green*, 3 Sneed, 384; *Lambert vs. Hill*, 41 Me., 475, and *Adams vs. Stevens*, 49 Me., 366.

While chancery has no power to make contracts for parties, or to substitute one for another, it can and will decree that they shall reform those which they have *actually* made; and if the paper does not fulfill, or violates their understanding it will be rectified and made to conform to it.

And a court of equity will grant relief in cases of mistake in written agreements, not only where the fact of the mistake is expressly established, but is fairly implied from the nature of the transaction. 1 Story's Eq. Jur., 161, sec. 162, and *Wyche vs. Green*, 11 Ga., 171, 172.

In the case of *Tilton vs. Tilton*, 9 N. H., 385, tenants in common agreed to make partition pursuant to the award of referees, and executed deeds for that purpose. In the deed to the complainant, a tract of land assigned to him, was omitted by mistake. The parties took possession according to their deeds. The defendant in his answer denied the mistake. The court held, that the mistake should be certified, and that a specific performance of the contract, as to the tract omitted, should be decreed. But in such cases the mistake must be made out in the most clear and decided manner, and to the entire satisfaction of the court, and the proofs must be clear and convincing, when the mistake is denied in the answer.

In the case of *Mosby vs. Wall*, 23 Miss., 81, it was held that a bill would lie to correct a mistake in a written contract, and enforce a specific performance of the contract as corrected.

But to authorize a court of equity to reform and enforce the contract, the evidence of the alleged mistake should be free from doubt; and in the case of *Oliver vs. M. C. Marine Ins. Co.*, 2 Curtis' Rep.,

291, the court says: "If one who applies for insurance makes known that he is an agent only, and the company agrees to effect the insurance, it is a necessary implication that such words shall be inserted in the policy, as are usually inserted in such cases, and as are necessary to make a binding contract. It is to be presumed that the underwriters intend to earn their premium, and therefore that they expect and desire that the insurance should attach upon some interest, and understand and agree, if a known agent applies for insurance, that the formula usually inserted when an agent obtains insurance, and which is necessary to the assumption of the risk, shall be in the policy when it is drawn. I think it may be safely laid down, that when a contract is made for a policy, whatever clause is usually inserted in policies, by reason of a given state of facts, and which it is necessary to insert to adapt the policy to that state of facts, both parties will be understood as agreeing to have inserted, if they are both apprised of that state of facts, and contract in reference to it."

That it is usual and necessary to insert in policies of insurance effected by agents in their own names, a declaration that they are insured as agents, or for whom it may concern, or some equivalent words, or to declare specially on whose account the insurance is made, will hardly be controverted.

In the case under consideration, it is admitted by the defendants in the court below by their answer that Sartorius did business in Vicksburg, as "agent," both by publication and by his sign.

William A. Fairchild, agent for the Phoenix Insurance Company, states in his testimony that on the 25th of September, 1865, the Ætna Insurance Company, through him as their agent, insured P. Sartorius, as agent, to the amount of \$1,500. Sartorius, in his testimony, states that when he took out the first policy of insurance, as above stated, on the 25th of September, 1865, he informed said Fairchild that he was doing business for the Hoffheimer Brothers & Co., of St. Louis, as their agent, and as the first policy was issued to him as agent, he requested Fairchild to make out the subsequent policies of insurance, which were issued to him, as the first was made out, and taking it for granted that Fairchild had done so, he never examined them until after the fire.

This was but a reasonable confidence, which he reposed in Mr. Fairchild, who, if we are to judge from his testimony, does not entertain a very exalted opinion of the integrity of Mr. Sartorius.

There can be no doubt that Mr. Fairchild had seen the sign and the

advertisements of Mr. Sartorius, as agent. But he may have supposed, as we may infer from his testimony, that this mode of advertising was adopted merely "to cover up his goods."

W. T. Page, who was an agent for several insurance companies, at Vicksburg, at the time the policy of insurance was issued, states in his testimony that if the applicant for insurance makes known to the insurance agent that he is selling goods as agent, it would be the duty of the insurance agent to fill up the policy to the applicant as agent.

It is very clear from the testimony that Sartorius was doing business as agent when these policies of insurance were taken out, and that by the first of them P. Sartorius was insured as agent, and there is no perceivable reason why the word agent should have been omitted in the subsequent policies of insurance. There is no evidence of a change of circumstances, between issuance of the first and the subsequent policies, which would authorize the underwriters to believe that there was a change of the ownership, in the interim, of the property to be insured. We are entirely satisfied that the policy sought to be corrected and reformed, was intended by the parties to insure P. Sartorius. agent, and therefore there is no error in the decree of the court below in this respect.

If the court has a competent jurisdiction, as we have seen it has, to correct such mistakes, the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance.

It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties.

The decree is affirmed.

[Mr. Justice Simrall not sitting, having been of counsel in this case in the court below.]

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

Appeal from the Supreme Court of the District of Columbia.

THE PHENIX MUTUAL LIFE INS. CO.,
of Hartford, Conn.,

Appellants,

vs.

ELIZABETH A. BAILEY.*

Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against marine and fire risks.

Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he has sustained by the loss of, or injury to, the property insured; and an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy.

The contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies.

Decided cases holding that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie*, are founded on an erroneous view of the nature of the contract.

A life policy is not invalid as a wager policy if the relation, whether of consanguinity or affinity, was such between the person, whose life was assured, and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the insured.

It is enough to entitle the insured in a life policy to recover, if it appears that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract.

The provision of the judiciary act that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law, is applicable where the suit is prosecuted in the chancery court of the District of Columbia.

Jurisdiction may be exercised by courts of equity to rescind written instruments, in cases where they have been procured by false representations or by fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury.

Where the party upon whose life the policy was issued, has died, and notice has been given, and the required proof furnished, and the obligation to pay has become fixed, by the terms of the policy, and the sum insured has become a purely legal demand, and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained.

Mr. Justice CLIFFORD delivered the opinion of the court.

* Decision rendered Dec. 11th, 1871.

Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire.

Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defence to an action on the policy, as the insured cannot justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred.

Life assurances have sometimes been construed in the same way; but the better opinion is, that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie*, are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. *Dalby vs. the India and London Ins. Co.*, 15 C. B., 365; *Loomis vs. Eagle L. and H. Ins. Co.*, 6 Gray, 396; *Lord vs. Dall*, 12 Mass., 118; *Trenton L. and F. Ins. Co. vs. Johnson*, 4 Zab., 576; *Rawls vs. American L. Ins. Co.*, 36 Barb., 357; same case, 27 N. Y., 282.

Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies.

Two policies for insurance, upon the life of Albert W. Bailey, the husband of the appellee, were issued by the appellants, and made payable to the appellee in ninety days after due notice and proof of the death of the husband. He died on the eleventh of October following, and due notice of that event was given to the appellants by the ap-

pellee, to whom the sums insured, amounting to ten thousand dollars, were payable, but they refused to pay the same, upon the ground that the policies were obtained by fraudulent misrepresentations and by the fraudulent suppression of material facts. They not only refused to pay the sums insured, but instituted the present suit in equity to enjoin the appellee from assigning, or in any manner disposing of the policies, and also prayed that she might be compelled by the decree of the court to deliver up the policies to be cancelled, and for further relief. Process was issued and served, and the respondent appeared and answered, denying all the charges set forth in the bill of complaint, and alleging that the complainants were bound to pay her the entire sums insured in the respective policies. Proofs were taken on both sides, and the cause having been duly transferred to the general term, the parties proceeded to final hearing, and the supreme court of the district entered a decree dismissing the bill of complaint with costs, but without prejudice, and the complainants appealed to this court.

Fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of complaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are denied in the answer, and the respondent has introduced proofs in support of those denials; but it is not going too far to say that the weight of the evidence, as exhibited in the record, is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

Suits in equity, the judiciary act provides, shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. *Hipp vs. Babin*, 19 How., 271; *Parker vs. Lake Co.*, 2 Bl., 545; *Boyce Ex'rs vs. Grundy*, 3 Pet., 210; *Graves vs. Ins. Co.*, 2 Cran., 444; 1 Stat. at Large, 82.

Much consideration was given to the construction of that section of the judiciary act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that

he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury. *Foley vs. Hill*, 1 Phil., 399; same case, 2 H. L. Cas., 28; *Fire Ins. Co. vs. Delavan*, 8 Paige Ch. R., 422; *Alexander vs. Muirhead*, 2 Dessau., 162; 5 Am. L. Reg., 564.

Exceptions undoubtedly exist to that rule, of which there are many to be found in the reports of judicial decisions, and in which preventive relief was administered by injunction. Such relief is granted to prevent irreparable injury or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as, from its continuance or permanent mischief, must occasion constantly recurring grievance, which cannot be removed or corrected otherwise than by such a preventive remedy.

Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted.

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of [such] a character that the vice in the inception of the same would be unavailing as a defense by the injured party, if the instruments were transferred for value into the hands of an innocent holder. Title deeds fraudulently procured may, under such circumstances, be decreed to be cancelled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality.

Such jurisdiction also extends to the protection of letters-patent against infringement, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the federal courts

is universal that if the defendant has a good defense at law, and the remedy at law is as perfect and competent as the remedy in equity, an injunction will not be granted.

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the *cestui que vie*, the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. *Foley vs. Hill*, 2 Ho. L. Cas., 45; *Thrale vs. Ross*, 2 Bro. C. C., 56; *Arundle vs. Holmes*, 4 Beav., 325; *Norris vs. Day*, 4 Y. & C., 475.

Where a party, if his theory of the controversy is correct, has a good defense at law to "a purely legal demand," he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under re-examination.

Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand," and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the judiciary act.

Decree affirmed.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

In Error to the Circuit Court of the United States for the District of Connecticut.

JOHN F. SEMMES, Adm'r of Wm. R. Lockett, dec'd, }
Pl'ff in Error, }

vs.

THE CITY FIRE INS. CO., of Hartford.*

Where the policy provided that no suit or action shall be sustainable, unless commenced within the time of twelve months next after the loss should occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, the period of twelve months does not open and expand itself so as to receive within it three or four years of legal disability, created by the war, and then close together at each end of that period so as to complete itself, as though the war had never occurred.

If the plaintiff shows any reason, which in law rebuts the presumption, which on failure to sue within twelve months, is by the contract made conclusive against the validity of the claim, that presumption is not revived again by the contract.

When the bar of the contract is removed, there still remains the bar of the statute, and though the plaintiff may show, by his disability to sue, a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority, that is, by the statute of limitations.

The disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, and that part of the contract presents no bar to plaintiff's right to recover.

Mr. Justice MILLER delivered the opinion of the court.

This is an action on a policy of insurance commenced on the 31st day of October, 1866, in the Circuit Court of the United States for the District of Connecticut, for a loss which occurred on the 5th day of January, 1860.

The only plea of the defendant is that the action was not brought within twelve months after the loss occurred, as provided in one of the conditions of the policy. To this plea there are replications setting up, among other things, that the late civil war prevented the

* Decision rendered Dec. 18th, 1871.

bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi, and the defendant of Connecticut, during all that time.

There is in the record a paper purporting to be an opinion of the court and a finding of the facts by the court, which finding is so mixed up with the argument of the court in support of its decision that, under the construction so frequently given to the act of March 3d, 1865, the paper cannot be treated as a part of the record, and can give us no aid in deciding the case, except what may be derived from the able argument of the learned judge who decided it below.

Fortunately, the pleadings themselves set up facts of which this court can take judicial notice sufficient to enable us to decide on the alleged error of the record, which is that the plea of defendant was held to present a good bar to the action, notwithstanding the effect of the war on the rights of the parties.

The circuit court, in arriving at this conclusion, held, first, that the condition in the contract, limiting the time in which suit could be brought, was, like the statute of limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. Ascertaining this by a reference to certain public acts of the political departments of the government, the court found that there was, between the time at which it fixes the commencement of the war and the date of plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

It is not necessary, in the view which we take of the matter, to inquire whether the circuit court was correct in the principle by which it fixed the date either of the commencement or cessation of the disability to sue, growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit, does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication,

take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue, yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was therefore necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. Defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that plaintiff shall have twelve months from the time *his cause of action accrued* to commence suit, but twelve months from the time of *loss*; yet by another condition, the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of *twelve months next after the loss shall occur*, and in case such action shall be commenced after the expiration of twelve months *next after* such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully, nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumption of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on plaintiff by the war relieves him from the consequences of failing to bring suit

Whether the plea be good or bad, depends upon the proper construction to be given to one of the conditions attached to the policy of insurance, which the assured were required to observe. This condition applies to the keeping of gunpowder on the premises. It is contended by the insurance company that keeping gunpowder in the store, in *any quantity*, vacated the policy, while the assured insist the policy is not defeated if they did not keep more than *one barrel* at a time. The clause of the policy out of which this difference in opinion arises is as follows: "Or if gunpowder, phosphorus, saltpetre, naphtha, benzine, benzine varnish, benzole, petroleum, or crude earth oils are kept on the premises, or if camphene, burning fluid, refined coal or earth oils are kept for sale, stored, or used on the premises, in quantities exceeding one barrel at any one time, without written permission, or endorsed upon the policy: then and in every such case this policy shall be void."

If this clause were detached from other parts of the instrument, there might be some question as to its proper grammatical construction. But such is not the case. It is the last clause in the fourth sub-division of the conditions embraced in the body of the policy, and in this sub-division a number of causes are set forth which shall operate to avoid the policy. These causes are all embraced in separate clauses, each class being separated from the others by a semicolon. If there were in the clause in dispute a semicolon where the word premises is first used, it may be, in view of the punctuation adopted in reference to the other clauses, that this clause would be complete in itself, and exclude wholly from the premises gunpowder, saltpetre, and the other articles in the same class. But in the absence of the semicolon, it is manifest that no greater restriction can be applied to gunpowder and saltpetre than to camphene and burning fluid, and that, therefore, the words "in quantities exceeding one barrel at any one time" are applicable alike to all the materials which are specified in the clause in controversy. This construction is fortified by the nature of the forbidden articles. Saltpetre is not a dangerous substance; and yet according to the view of the counsel for the plaintiff in error, it is prohibited altogether, while a barrel of camphene and burning fluid, which are inflammable, can be stored with impunity. A construction that would lead to such a result cannot be adopted, unless the language employed leaves no other alternative.

Besides, if the contract is as contended for, it would impeach the good faith and fair dealing of the insurance company, for it would be deceptive, and calculated to mislead those who are not well informed

on matters of this kind. It is well known that the agencies of this company are located in all parts of the country, and that in many places where they are established, housekeepers generally keep on hand, for their own use, in small quantities, gunpowder, saltpetre, benzine, and perhaps other interdicted articles. It would never occur to this class of persons, on making application at one of these agencies for insurance, that they were forbidden to keep these things in their houses, and unless their attention was particularly called to the subject, which would be an unusual occurrence, they would take out their policies in the belief that they could keep and use the substances required for their necessities as they had been in the habit of doing; and if they should happen to read over the schedule of conditions annexed to the policy, usually printed in the smallest type, not being accustomed to a critical examination of the structure of sentences, they would naturally conclude, as saltpetre and gunpowder are classed together, and as saltpetre is comparatively harmless, while camphene and burning fluid are quite dangerous, that the restriction at the end of the enumerated articles was intended to be applied to all of them alike.

This, too, is the rational construction of the clause in question, and we cannot suppose the company which framed this policy intended it to be interpreted differently.

If insurance companies do not mean to take risks on property where gunpowder, saltpetre, and the like substances are kept, even for ordinary use, then good faith to the assured requires that they should declare their intention in terms which cannot admit of controversy; and, in order to avoid just cause of complaint, it would be better for them to employ type, in relation to this important subject, large enough to arrest the attention of an interested party.

In our opinion the circuit court did not err in sustaining the demurrer to the third plea, and the judgment of that court is, accordingly, affirmed.

The motion for damages is disallowed.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

WM. C. HALL & JOHN S. LONG, doing business under
the firm and style of Hall & Long, *Pl'ffs in Error*,

vs.

THE NASHVILLE & CHATTANOOGA R. R. CO.*

As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary.

In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty.

The insurer stands practically in the position of a surety, and whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity, which the satisfied owner held against the party primarily liable.

This right of the insurer rests upon the doctrine of subrogation, and depends not upon privity of contract, but is worked out through the right of the creditor or owner. Hence, any insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier, whose failure of duty caused the loss.

There is no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea, which does not exist in support of a like subrogation in case of an insurance against fire on land.

Where the fire by which the goods were destroyed was accidental and without fault of the carriers they were responsible. Where a loss occurs, unless caused by act of God or of a public enemy, the carrier is always in fault, and the law raises against him a conclusive presumption of misconduct or breach of duty in relation to every loss not caused by excepted perils.

WILLIAM ATWOOD, *for Pl'ffs in Error*.

HENRY COOPER, *for Def'ts in Error*.

Mr. Justice STRONG delivered the opinion of the court.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them,

* Decision rendered March 4th, 1872.

the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured may recover for a total loss without it. It is laid down in *Phillips on Insurance*, § 1,723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.

In *Gales vs. Hailman*, 11 Penn., St., 515, it was ruled that a ship-

per, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart et al. vs. The Western Railroad Company*, 13 Met., Mass., it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers, who had paid a loss, to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers. *Rockingham Mutual Fire Insurance Company vs. Boshier*, 39 Me., 253; *Peoria Ins. Co. vs. Frost*, 37 Ill., 333; *Conn. Mut. Life Ins. Co. vs. New York & New Haven R. R. Co.*, 25 Conn., 265. And such is the English doctrine settled at an early period. *Mason vs. Sainsbury*, 3 Dougl., 60; *Yates vs. Whyte*, 4 Bingh. N. C., 272; *Clark vs. Blything*, 2 B. & C., 254; *Randall vs. Cochrane*, 1 Ves., Sen., 98.

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not

stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss.

There is nothing then to take the case in hand out of the general rule that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

It follows that the circuit court erred in giving judgment for the defendants on their demurrer to the third count of the declaration, and on the plaintiffs' demurrer to the defendants' second and third pleas.

The judgment is reversed, and the cause is remanded for further proceedings.

COURT OF APPEALS, NEW YORK.

Appeal from General Term of Supreme Court First Judicial District.

RICHARD S. WARING *et al.*, Respondents,

vs.

THE INDEMNITY FIRE INS. CO., Appellants.*

The Company, by its policy, agreed to insure the plaintiffs against loss or damage by fire, on refined carbon oil, their own, or held in trust, on commission, or sold but not removed, contained in bonded warehouse, &c. Previous to the fire the plaintiffs had sold the oil and received their pay, and by the delivery of invoices and gaugers' certificates, there had been a complete delivery according to the custom of the trade; but the place of storage had not been changed.

Held, that the policy was intended to cover the property, which had been sold, and of which a legal, binding delivery had been made; the ownership and right of control of which had passed, but which had not been in fact removed; of which no change of place indicated a change of ownership and possession.

It is not forbidden by the law that a policy should be so framed as that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risk, shall become in turn the parties really insured.

Agents, commission merchants or others, having the custody of and being responsible for property, may insure in their own names; and they may, in their own names recover of the insurer, not only a sum equal to their own interest in the property, by reason of any lien for advances or charges, but of the full amount named in the policy, up to the value of the property.

*Decision rendered June 6th, 1871.

For the purpose of saving expense in storage, for the purpose also, it may be inferred from all the circumstances, of saving expense of a new insurance, the property was left in the same warehouse, and by the custom of the trade, as it is said, in the possession still of the plaintiffs. Thus was established that relation which enabled the plaintiffs to prolong the defendant's risk upon the property.

Although the vendees of the plaintiffs, the owners of the property, are not by name or peculiar mention designated in the policy, there are terms there, which have been held to bring within such a contract persons not named in it, but yet interested in the property insured, which may be done.

It must be made to appear that the owner was in the intention of the person effecting the insurance, when the contract was made, and it is to be assumed that every one was in the intention of the insurer, who subsequently, with design, takes such relation to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons, who, during the running of the policy, should have goods within the description of property insured..

Though the action is in the name of the persons named in the policy, their recovery will be in trust for their vendees.

This action is properly brought under section 113 of the code.

It was not improper or immaterial to show that the parties made it a part of their bargain, that the oil should remain where it was, in the warehouse, without charge for storage, and that it remained in the possession of plaintiffs.

WHEELER H. PECKHAM, *for Appellants.*

F. F. MARBURY, *for Respondent.*

FOLGER, J.

Though there was a time after the making of the policy, at which the property was covered by it, and the plaintiffs were insured by it, it must be conceded that when the property was destroyed by fire, the plaintiffs had no such interest in it, as that they suffered any immediate pecuniary loss. The proof is that they had sold the oil and received their pay. The proof also is that the oil was on store in a United States bonded warehouse, and that, by the delivery of invoices and gauger's certificates to vendees of the plaintiffs, there had been a complete delivery of the property to the vendees, according to the custom of the trade. Nothing more was to be done to it by the vendors to enable the vendees to remove it. But the place of storage had not been changed. It remained on store where it had been deposited by the plaintiffs, without expense to the vendees. It was also testified, under the defendant's objection, that the plaintiffs, according to custom in Philadelphia, retained the possession of it.

It is evident that the plaintiffs had no property in the oil, nor any claim upon it for purchase money, or any charges of any kind. But they did have possession of it by the consent of vendees, and thus the right to possession as against all the world but the vendees.

Under this state of the facts, it is to be determined whether the contract of insurance may be so construed, either from its language, or from the surrounding circumstances, as that it can be determined that

the defendants meant to continue the risk taken upon this oil after it was sold and delivered by the plaintiffs; and also whether they meant to insure the pecuniary interest in it of any other persons than the plaintiffs.

We have but little difficulty in holding, from the peculiar phraseology of the policy, that something other was meant than property of which a contract of sale had been made, but of which no delivery had yet taken place. "Sold but not delivered," is a phrase common with insurance men, and has an ascertained and definite meaning. It applies to property of which a contract of sale has been made, but of which the ownership has not been changed by a delivery in pursuance of the contract. "Sold but not removed," is another, and we deem a newer form, to express something else. We judge that it was meant to cover that which had been sold and of which a legal, binding delivery had been made; the ownership and right of control of which had passed, but which had not been in fact removed; of which no change of place indicated a change of ownership and possession. It is easy to be seen that it might be an advantage and a convenience to the plaintiff to have a policy which would thus cover property once their's for sale, but after that sold and delivered and paid for. In the great rapidity, number and value of the transactions in such a commodity, in such a market, such an insurance would much facilitate the business of both parties, increasing that of the vendors and making safe that of the vendees. If the plaintiffs had a shifting policy, which would change with their daily transactions, in the property, and cover it to-day as in the ownership of the plaintiffs, the next day as that held by them in trust or on commission, and the next as that of some complete vendee, who has not yet had the time or the occasion to remove it, much time, trouble, care and expense would be saved to customers, and thus would arise a persuasive inducement for dealers to become the vendees of these plaintiffs. Thus it is to be seen that the adoption of this phraseology, novel, and taking in property not theretofore or without it covered by the terms of a policy, had a purpose on the part of the assured, one which was voluntarily and intelligently acceded to by the insurer. For though the use of it increased in some degree the burden upon the company, it could not have been by the company inserted aimlessly in the policy, or without comprehension of its meaning. I do not, from the whole written description of the property to be covered by the policy, doubt that such was its meaning. It comes to this by natural steps. The risk is taken "on refined carbon oil." *First*, "their own;" i. e., that which the plaintiffs, during the term,

held as their own property, owned and possessed by them. *Second*, "held in trust;" i. e., that of which they had the care and custody, intrusted to them as representatives of others, and for which they are responsible to the owner, *Stillwell vs. Staples*, 19 N. Y., 401; and in this term may be included that which they had sold but not delivered. *Third*, "held on commission;" i. e., that which they held, coming into or continuing in their care and custody, for the purpose and with the duty of sale. *Fourth*, that which was "sold but not removed," an additional phrase, not to be supposed a repetition of the meaning of the others, but to have been used as an addition to their meaning, taking in that which, once having been their own, or once having been held by them on commission, had been fully sold and technically delivered; the title and right of possession changed, but not yet removed from that place of storage.

The phraseology comprehends all this, and goes naturally and regularly, as expressive of a well-formed intention to comprehend all, and to affix the indemnity of the contract to the property in whatsoever of these conditions it should be, and throughout them all. And provided that there is some one in fact beneficially interested in the policy as an assured, there is nothing contrary to the policy of the law in intending and effecting such an insurance, and it may be upheld. For here is an actual subject of a risk, and the proviso being met, there is a person who has an interest in the subject, and is himself affected by the risk. We have, then, here, a policy which did, in its inception, by its terms cover this particular property, and did designedly cover it. And we have a policy by which it was meant by insurer and insured that the risk taken should cover and adhere to the same property, after it had left the ownership of the persons designated by name in it; by which, necessarily, it was also meant to follow and to cover that property in the ownership of the vendee of the original owner named in the policy. It is not forbidden by the law that a policy should be so framed as that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risk, shall become, in turn the parties really insured. 2 Duer on Ins., 49; Lecture 9, § 31.

But it remains to be seen whether this contract of insurance could be made or continued in the name of the plaintiffs for the benefit of their vendees not especially designated. It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner, without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adop-

tion of it, even after a loss has occurred. *Angel on Ins.*, § 79, cited and approved by Denio, Ch. J.; *Herkimer vs. Rice*, 27 N. Y., 163, 181.

In the edition of *Angel* which is before me, (Boston, 1844,) the authorities cited to sustain this proposition disclosed some relation existing between the person who effected the insurance and was named in the policy, and the property insured, either as the agent for the owner or as the occupant of the property, or as having the care, possession and control of it, as bailee. Agents, commission merchants or others, having the custody of and being responsible for property, may insure in their own names; and they may in their own names recover of the insurer, not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. In all such cases the right to insure and the right to recover seem to be founded upon the relation above adverted to. See *De Forrest vs. Fulton Ins. Co.*, 1 Hall, S. C. Rep., 84; *Stillwell vs. Staples*, 19 N. Y., 401; *Siter vs. Motts*, 1 Harris, Penn. St. R., 218.

The right is put upon the fact, that having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect from loss, so that it or its value may be rendered to the owner when he calls for his own. Now there did in this case exist a relation between the plaintiffs and the property and its owner. Although it had been sold and paid for, and in legal contemplation delivered, its place of storage had not been changed. For the purpose of saving expense in storage, for the purpose also, it may be inferred from all the circumstances, of saving expense of a new insurance, it was left in the same warehouse, and by the custom of the trade, as is said, in the possession still of the plaintiffs. Thus was established that relation which enabled the plaintiffs to prolong the defendant's risk upon the property.

And although the vendees of the plaintiffs, the owners of the property, are not by name or peculiar mention designated in the policy, there are terms there, which have been held to bring within such a contract persons not named in it, but yet interested in the property insured, which may be done. *Phillips on Ins.*, vol. 1, p. 197, § 382; p. 202, § 388.

The phrases describing property "as held in trust," or "on commission," and kindred terms, in a policy to an agent, factor or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract and to enforce it in his

own name or that of his agent. *Lee vs. Adsit, supra*; *Stillwell vs. Staples, supra*. Some cases go further than this, and hold that one may insure in his own name the property of another for the benefit of the owner, without his previous sanction or authority, and that it will inure to the party intended to be protected upon his subsequent adoption, even after a loss has occurred. *Miltenberger vs. Beacom*, 9 Barr, Penn. St. R., 198.

Of course it must be made to appear that the owner was in the intention of the person effecting the insurance, when the contract was made. 1 Phillips on Ins., p. 198, § 383. Such intention need not have fastened at the time of entering into the contract upon the very person who, when the contract matures, seeks to take the benefit of it. Otherwise, policies to commission merchants, warehousemen, factors and persons in the position of these plaintiffs, in which are clauses of this general nature, would be of little avail. For, obviously, it cannot be foreseen who will, in the course of the term of the policy, come into such relations with them. And it is to be assumed that every one was in the intention of the insurer, who subsequently, with design, takes such relation to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons, who, during the running of the policy, should have goods within the description of property insured.

And such intention, we hold, appears from the phraseology of this policy. Bunker Brothers were vendees of plaintiffs, of property "sold but not removed." One of that firm was a witness upon the trial of the case. Nothing shows that they repudiate the contract made or continued for their benefit. And though the action is in the name of the persons named in the policy, their recovery will be in trust for Bunker Brothers. *Stillwell vs. Staples, supra*.

Section 113 of the code declares that the term "trustee of an express trust," as therein used, shall include a person with whom or in whose name a contract is made for the benefit of another, and permits an action on the contract to be brought in the name of the trustee. So this action is properly brought in that respect.

The exception to the admission of testimony was not well taken. The objection was to the question put, and this called for no more than the agreement of the plaintiffs and their vendees as to storage. It was not improper or immaterial to show that they made it a part of their bargain that the oil should remain where it was, in the warehouse, without charge for storage, and that it remained in the possession of plaintiffs. It was part of the whole arrangement between the

plaintiffs and their customers, by which, when oil was sold but not removed, it remained free from expense for storage, and covered by the prior policy of insurance. It could not, of course, force upon the defendants any contract different from the one which they made with the plaintiffs; but it was material to aid in showing with what purpose the peculiar phraseology of this policy was adopted. It was not in contradistinction or explanation of, or addition to, a written contract. It was proof of a fact, which existed after the sale and delivery, that though the sale and delivery were in legal contemplation complete, the subject of the sale remained in the vendors' possession, in accordance with a custom of the trade in that city.

The judgment of the court below must be affirmed, with costs to the respondent.

All agree, except Peckham, J., who does not sit.

Judgment affirmed.

SUPREME COURT OF VERMONT,

FEBRUARY TERM, 1871.

ERASMUS A. PLIMPTON, Ex'r, *Appellant*,

vs.

FARMERS' MUT. FIRE INS. CO., & JOSEPH MUNDELL.*

The defendant took out a policy of insurance on his buildings in his own name and for his own benefit. Afterwards, the plaintiff brought suit, and by levy of execution, acquired title to the premises. Subsequent to this, the buildings were destroyed by fire.

Held, that the title to the premises gave the plaintiff no legal or equitable claim to the insurance, and that he is not entitled to the whole or any part of the proceeds of said insurance.

The contract of insurance is, in general, confined to the parties, and as a general principle, no other person has any right, in law or equity, to the proceeds, unless a legal or equitable right thereto has been created by contract with a third person; or by some act of the insured, those proceeds have become clothed with the character of real estate, or with a trust in favor of a third person.

* Decision rendered February Term, 1871.

WILSON, J.

The orator seeks to restrain the defendant company from paying certain insurance money to the defendant, Mundell, and for a decree that the same be paid to the orator. The only question we have felt called on to decide in this case is, whether the orator has a legal or equitable claim to any portion of the money in question.

It appears that Mundell, on the 5th day of November, 1866, being the owner of certain real estate, occupied by him as a homestead, procured the buildings upon it to be insured by said company. About the 9th of that month, the orator commenced a suit against Mundell, and attached said homestead upon the writ in that suit, which was duly entered in Windham County Court, and such proceedings were had therein, that the plaintiff, at the September term of said court, in 1867, recovered judgment against Mundell for \$242.95 damages, and his costs, taxed at \$23.36. On the 29th of February, 1868, the orator took out execution upon said judgment, and caused the same to be levied upon said premises, in full satisfaction of said execution and the costs and charges thereon. In October, 1868, the buildings upon said premises were destroyed by fire. The loss was adjusted at \$381.18, including loss on personal property, of which the sum of \$190 is for the insurance on the buildings. It is insisted by the orator's counsel that the buildings were not a part of a homestead, as against him in respect to said debt, and having levied upon the premises in satisfaction of the debt, he claims the insurance that was on them, on the ground of the alleged title of the plaintiff at the time of the loss.

The question whether the orator has a legal equity to the proceeds of the policy, is wholly independent of the question whether the debt upon which said judgment is founded was an existing cause of action at the time of acquiring the homestead. This view of the subject renders it unnecessary to decide whether the property was exempt from said attachment and levy or not.

It seems to us clear that the orator is not entitled to the whole or any part of the proceeds of said insurance. In *Lynch et al. vs. Dalzell et al.*, 4 Bro. P. C., 432, it is held that such insurance does not attach on the realty, or in any manner go with the same, as incident thereto by any conveyance or assignment of the estate. In *Vernon vs. Smith*, 5 B. & Ald., 1, the court decided that a covenant on the part of the lessee to keep the premises insured runs with the land. So, also, when the mortgagor covenanted with the mortgagee that

he would keep the premises insured, during the continuance of the mortgage lien, and in case of loss that the proceeds of the policy should be applied to the rebuilding of the property insured, it was held in Maryland that the mortgagee had an equitable lien upon the fund received by the mortgagor from the insurers to satisfy the balance of his debt, which he could not collect by a foreclosure and sale of the mortgaged premises. *Thomas vs. Vonkapff*, 6 Gill. & J., 372. Where the insurance is effected by the mortgagee at the request of the mortgagor, a privity exists between the parties, and the premiums paid become a charge upon the mortgaged premises, in addition to, and equally with the original debt, except so far as subsequent mortgagees and purchasers are concerned, and the amount paid by the insurers to the mortgagee goes to reduce the debt of the mortgagor, who is entitled to the balance, if the proceeds are more than sufficient to pay the debt. 14 Conn., 32; 7 Cush., 16. But it would seem that the mortgagee has in general no claim, either in law or equity, upon the proceeds of a policy effected by the mortgagor, in his own name, on the mortgaged premises, without any agreement to keep the premises insured, unless the policy be assigned to him. *Columbian Insurance Company vs. Lawrence*, 10 Pet., 512; *Carter vs. Washington Insurance Company*, 16 Pet., 504; *Carter vs. Rockett*, 8 Paige, Ch. 437; *Saunders vs. Frost*, 5 Pick., 259.

In *White vs. Brown*, 2 Cush., 412, and in *King vs. State Mutual Ins. Co.*, 7 Cush., 1, the court were of opinion that an insurance on a building could not be converted into an insurance of a debt, by proof that the interest of the insured was limited to a mortgage, and that he was, consequently entitled to recover the whole amount of the loss for his own benefit, without crediting it to the mortgagor. But it will be observed that the view taken in the two cases last above cited, so far as they hold the mortgagee not bound to credit the insurance money upon the mortgaged debt, is at variance with that taken in *Carter vs. Washington Insurance Company*, and in the case of *Smith vs. The Columbian Insurance Company*. It is said by Mr. Ellis, in his work on insurance, page 162, that no equity attaches upon the proceeds of policies of insurance in favor of third persons, unless there be some contract or agreement or trust to that effect, and several cases are there cited in support of this view of the subject. Although in none of the cases above cited did the question arise whether a person having acquired title by levy of execution on premises insured to the execution debtor, could justly claim the proceeds of the policy in case of loss by fire, yet the general principles enunciated by those

cases are entitled to great weight, so far as they are applicable to the facts of this case.

Insurance is a contract of indemnity, given by the insurer, in consideration of the premium paid by the insured, against such loss or damage by fire as may happen to the insured in respect to the property covered by the policy. It is a special agreement with the person insuring against such loss or damage as he may sustain. The contract of insurance is in general confined to the parties, and as a general principle, no other person has any right in law or equity to the proceeds, unless a legal or equitable right thereto has been created by contract with a third person; or by some act of the insured, those proceeds have become clothed with the character of real estate, or with a trust in favor of a third person.

Mundell owned the premises at the time the insurance was effected. He claimed and occupied them as a homestead. He procured the insurance in his own name for his own benefit, or the benefit of himself, his heirs and assigns, and paid the premiums from his own funds. By this precaution he has protected himself from the loss he would otherwise have sustained by the accident. The orator caused his execution to be levied upon the premises. The defendant, Mundell, claiming the premises exempt from said attachment and levy, did not redeem; hence the title of the orator became absolute, if the premises were not exempt from said levy, and it was regularly made. But this gave the orator no legal or equitable claim to the insurance. There was no contract or understanding between the orator and Mundell in respect to procuring said policy, and no assignment of it to the orator. The orator paid no premium for said policy, and has incurred no liability to the insurance company or for Mundell in respect to or in faith of said insurance. As to said insurance, the orator stands as an entire stranger, both as to Mundell and the company. If he has or ever had any title to the premises, (a question which we have no occasion to decide,) he acquired it by said levy—a proceeding strictly *in invitum*, from which no inference can be drawn as to any agreement or understanding between him and Mundell, or the company in respect to the proceeds of the policy. No privity ever existed between the orator and Mundell, or between the orator and said company, in respect to the policy or its proceeds, and there is no foundation for a trust in favor of the orator. If the orator acquired title to the premises, it became absolute before the loss, and he might have negotiated a policy for his own benefit, and have protected himself from loss; but not having done so, he took the risk and must

bear the loss, and can have no recourse to the insurance, with which he had nothing whatever to do, and to which he has no legal equity.

It is said by orator's counsel that Mundell had no insurable interest in the buildings after the levy of the orator's execution became absolute; that the insurance company allowed the insurance to remain, and it belongs, says the orator, to the real owner of the premises. Upon the facts of this case, the insurance was and is a matter entirely between Mundell and said company, and does not in any way or manner concern the orator. It does not appear that Mundell has done anything to affect his title or to invalidate the insurance. It would seem that the insurers very sensibly determined that the mere fact that the orator had levied upon the homestead, and the time of redemption had expired, would not authorize the company to cancel the policy upon the assumption that the title had passed to the orator. But however this may be, the company is willing to pay the insurance money to the party or person entitled to receive it. We hold that the orator is not entitled to said money; that it justly belongs to the defendant, Mundell.

The decree of the chancellor, dismissing the bill, is affirmed, with costs to the defendants, and the cause remanded to the court of chancery to be disposed of accordingly.

SUPREME COURT OF KANSAS.

Error from District Court of Shawnee County.

THE HARTFORD INS. CO., *Pl'ff in Error,* }

vs.

THE STATE OF KANSAS, *Def't in Error.** }

The statute provided that "before the Auditor shall issue any certificate of authority, or any renewal of the same, the corporation or its agent shall pay into the State Treasury, for the support of common schools, the sum of fifty dollars."

On the 25th of February the Auditor issued his certificate of authority to the company; gave his receipt for \$50 and his fees; and drew on the company his draft, payable at sight. The draft was paid on presentation, and on the 21st of March

* Decision rendered April 23d, 1872.

the money was received by the Auditor, and was by him paid into the State Treasury.

Until the money was paid into the treasury, the Auditor had no power, under the law, to issue the certificate of authority.

If the corporation chose to pay the money through the Auditor, then, for that purpose, he was the agent of the corporation and not of the State; and until the money reached the State Treasury, it was under the control of the corporation and not of the State.

Because of the non-payment of this money, the certificate itself was void, and presented no defense to the action.

KINGMAN, Ch. J.

An action was instituted against the plaintiff in error, a foreign corporation, engaged in the business of fire insurance in this State, without having obtained from the Superintendent of Insurance of the State a certificate of authority to transact such business of insurance in this State, and without having any legal right, warrant or authority to transact the business of fire insurance in the State of Kansas. The answer was a general denial, and a special defense, setting up a license or certificate of authority, issued in the plaintiff in error by the Auditor of State, on the 25th day of February, 1871, authorizing the corporation to transact the business of fire insurance in the State from the 1st day of March, 1871, until the 28th day of February, 1872. The issues so made were tried by the district court, without the intervention of a jury, and resulted in a judgment against the plaintiff in error, to reverse which the case is brought to this court.

Two questions are presented: *First*, did the Auditor issue a valid certificate of authority to the plaintiff in error, as set up in his answer? *Second*, did such certificate of authority, if valid, confer upon the plaintiff in error such a vested right to do business until the last day of February, 1872, as would preclude the legislature from imposing further regulations and duties upon foreign corporations, as a necessary pre-requisite to their transacting business in the State? If the first of these questions is decided in the affirmative, then it will become necessary to determine the second. The case was tried on an agreed statement of facts, and documentary evidence, all of which are brought to this court.

We think the record shows a want of conformity with the requirements of the statute on the part of the insurance company in matters essentially requisite to be done by the company, under the law. Whether such informalities can be inquired into in this proceeding, or whether the decision of the Auditor, that the company had complied with all the requirements of the law, and thereupon had issued his "certificate of authority," is conclusive, need not be decided here.

It is an interesting question, and was somewhat elaborately argued : but it is not in our way. There is one fact that is jurisdictional in its character. By § 110, Gen. Stat., p. 220, it is provided that "before the Auditor shall issue any certificate of authority, or any renewal of the same, the corporation or its agent shall pay into the State Treasury, for the support of the common schools, the sum of fifty dollars." The payment of this money was an act to be done by the corporation, and to be done before it had a right to ask for the certificate of authority, and without the payment of which the certificate of authority is a nullity. In this case it appears that the certificate of authority was issued on the 25th of February, 1871, and that the money was not paid into the treasury until the 21st of March thereafter. When the Auditor issued the certificate of authority, he receipted for the fifty dollars and his fees, and drew on the plaintiff in error his draft for the same, payable on sight, and transferred the same to the Topeka Bank. The draft was paid on presentation, and on the 21st of March the money was paid by the Auditor into the treasury. Until it was paid into the treasury, the State had no interest in it, or control over it : and until it was so paid, the Auditor had no power under the law to issue the certificate of authority. Plaintiff in error claims that the State received the money when the Auditor drew the draft ; that the Auditor acted as the agent of the State in receiving the money, and therefore the State cannot in honor deny that it received the money. The argument involves an error of fact, and an entire misapprehension of the duties and powers of a public officer. The error of fact is in assuming that the drawing of a draft payable on sight is the same thing as receiving the money from the drawee ; but the much more serious error is found in the declaration that the Auditor acted as the agent of the State in drawing the draft, or in receiving the money when it was paid. The limits of an officer's authority are found in the law. The law in this case, for reasons in harmony with our entire financial system, gave no authority to the Auditor to collect the money. It is one of the checks of our system that the Treasurer receives the State's money, and the amount which he receives shall appear in the records of some other office. It is not necessary to say that the plaintiff in error was bound to know the details of our financial system, or be familiar with its general spirit ; but when it came within the State, seeking to extend its business among our people, it was bound at its peril to take notice of express provisions of law stating the terms upon which it could be permitted to do business in the State. One of the conditions was, that by itself or its agent it should

pay a certain sum into the State Treasury, before the Auditor could issue the certificate, and before it acquired any right to a certificate, or any authority to do business in this State. If the corporation chose to pay this through the Auditor, then for that purpose he was agent of the corporation, and not of the State; and until the money reached the State Treasury, it was under the control of the corporation and not of the State.

Therefore, when the certificate of authority was issued, one of the vital conditions upon which it could be granted, had not been complied with on the part of plaintiff in error. It was a condition that neither the Auditor nor any other officer could waive or dispense with. Because of the non-payment of this money, the certificate itself was void, and presented no defense to the action.

This conclusion renders it unnecessary to consider any of the other questions raised in this case.

The judgment is affirmed.

SUPREME COURT OF VERMONT,

FEBRUARY TERM, 1871.

MOSES P. HARDING, *Plaintiff*,

vs.

TOWN OF TOWNSHEND, *Defendant*.*

The plaintiff had received of an insurance company, the amount of an insurance for the injury he had received by an accident.

In a suit against the town for the damage sustained by the accident, on account of the unsafe condition of the highway, there is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the company should operate as a defense, or inure to the benefit of the defendant.

The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter; nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter.

If it is assumed that the plaintiff is entitled to but one satisfaction for the injury he has sustained, the defendant stands in no condition to make that objection. As between the insurer and the defendant, the defendant ought primarily to make compensation to the plaintiff, and ultimately to bear the loss, and the payment by

* Decision rendered February Term, 1871.

the insurer, and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them.

H. E. STOUGHTON, *for Pl'ff.*

A. STODDARD, *for Def't.*

PECK, J.

There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff, of the accident insurance company, should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff, and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by the relation of the parties, or by contract or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.

But it is argued on the part of the defense, that the plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay the damage—which of the two ought primarily to make compensation to the plaintiff, and ultimately to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant should ultimately bear the loss, then the payment by the insurer, and the collection of the entire damage of the defendant, only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest, and with which he has no concern.

The statute imposes upon the towns severally the duty of keeping their highways in good and sufficient repair, and makes each town liable for any special damage happening to any person by reason of

the insufficiency or want of repair of any highway in such town. The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong-doer, and whether such by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case.

In such case, as between the insurer and the wrong-doer, in reason and justice, the burden of making compensation to the injured party, ought to be ultimately borne by the party thus in fault. The party whose wrongful act or culpable negligence caused the injury, ought to make compensation and bear the loss. Therefore, if there is any such connection between these two remedies as to have the enforcement of one operate in defense or mitigation of the other, it is the insurer and not the town that should be entitled to this benefit. It would seem to be a perversion of justice to subrogate the wrong-doer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer. But it is not uncommon that the insurer, who has paid the loss, is put in place of the insured, and subrogated to his rights in respect to his remedies against others for the injury. *Randal vs. Cockran*, 1 Vesey, Sen., 98, is an instance of the application of this principle in equity.

In principle, the question involved in this case has been settled in analogous cases. In *Mason vs. Sainsbury*, 3 Doug., 61, it was held that in an action against the Hundred, under Stat. Geo. I, to recover for the destruction of the plaintiff's house by a mob, the fact that the plaintiff had received the amount of his loss from the insurer, would not avail the defendant in defense. In that case it appeared that the action was prosecuted for the benefit of the insurer, but it establishes the principle that the right of the insurer is paramount to that of the wrong-doer, *or one in place of the wrong-doer*.

So in *Clark vs. The Inhabitants of the Hundred of Blythiny*, 2 B. & C., 254, (9 E. Com. L., 77,) it was decided that the owner of certain stacks of hay and corn, which were maliciously set on fire, who had received the amount of his loss from an insurance office, could nevertheless recover the amount in an action against the Hundred, under the Stat. Geo. I.

In the case at bar, the town is certainly no less to be regarded as in fault for the insufficiency of its highways, than the Hundred for crimes committed by individuals within its limits.

In *Yates vs. Whyte and others*, 33 E. Com. L. R., 349, (4 Bing., New Cases, 272,) in an action for damage to plaintiffs, by collision with

defendant's ship, it was held defendant was not entitled to deduct from the amount of damages a sum paid to plaintiff by insurers, in respect to such damage. The same decision was made in a similar case of collision of vessels, *The Propeller Monticello vs. Gilbert Mollison*, in *Admiralty*, 17 How., 152. In that case there had been an abandonment to the insurers, and an acceptance of the abandonment by the insurers, who had paid the insurance prior to the filing of the libel; and Grier, J., says that the doctrine, that in such case the fact that the injured party has received satisfaction from insurers cannot avail the defendant, is well settled at common law, and received in courts of admiralty.

We are referred by defendant's counsel to *Bird vs. Randall*, 3 Burr.. 1,345, in support of the proposition that the defendant can avail himself of such payment. But in this case, the plaintiff, having sued and collected of the servant the full stipulated penalty as damages for permanently abandoning his service, it was held that the plaintiff could not afterwards recover of the defendant, for procuring or enticing the servant thus to abandon his master's service. In that case the servant and defendant were both wrong-doers, and in principle stood in the relation of joint tortfeasors, and hence the one who did the act that caused the injury, having made full satisfaction therefor, the other could not be held liable for the same injury for having aided in procuring the servant to do the wrongful act. The only case which I find, which seems to favor the application of the insurance money in reduction of the damages, is what is said in a note to *Pym. Adm'r, vs. The Great Northern Railway Company*, 4 B. & S., 396. (116 E. C. L. R.,) decided in 1863, in the Exchequer Chamber, on appeal from the decision of the Court of Queen's Bench. It was an action upon 9 and 10 Viet., Ch. 93, by the plaintiff, as the widow and administratrix of her husband, to recover for the pecuniary loss to herself and his children from his death, caused by negligence of the defendant. The right to deduct insurance money from the damages was not involved in that case, but it seems from what is said in that case by defendant's counsel, in reply to a question by Pollack, C. B., that there was no case under that statute, where, in estimating the damages, notice had been taken of life insurance left behind by the deceased, except an unreported case at *nisi prius*, *Hicks vs. The Newport, Abergavenny & Hereford Railway Company*, in which it is said by defendant's counsel, that Lord Campbell held that in such action upon that statute, a deduction should be made from the damages on account of such insurance; and in a note is stated what pur-

ports to be the charge of Lord Campbell to the jury in that case, in 1857, directing them to deduct a sum received on an insurance against accidents by railways, and allowing them, if they thought proper, to make a deduction on account of other insurances on the life of the deceased. The facts are not stated otherwise than as they may be inferred from what is given of the charge. If this *nisi prius* case is not distinguishable from the cases above referred to, it cannot be regarded as of equal authority; nor can we regard it as controlling the decision of the case at bar.

But there is a distinction between that case under the English statute and the case at bar, and other cases referred to. Under the English statute, the action is not brought by the deceased, the party upon whom the injury was directly inflicted, nor is the recovery for the same cause of action that the deceased would have had, had he survived; but the statute gives a new cause of action, based on a different principle. The recovery is not for the damages which the deceased might have recovered had he survived, but is solely for the pecuniary loss the persons for whose benefit the action is brought—"the wife, husband, parent and child of the person whose death shall have been so caused,"—sustain by such death. In such case, in estimating the pecuniary loss to the family, which they have sustained by the death of the father, it might be less objectionable to take into consideration an insurance on his life, which he left for their special benefit, not procured by them or at their expense, than to give the defendant the benefit of the insurance in the case at bar.

But still, if to be considered at all, it is more reasonable to hold that the superior equity is in the insurers, who pay the loss. And in *Althorp, Adm'r, vs. Wolfe*, 22 Smith, 355, it appears to be regarded as settled by the court of Appeals, that under the New York statute, which is in substance like the English statute above mentioned, the fact that the widow received an amount insured upon the life of her husband for the benefit of the wife, cannot be taken in reduction of damages recoverable under the statute for her benefit. This seems to be the more reasonable doctrine, and most in harmony with the principles established by the decided cases.

Judgment of the county court reversed, and judgment for the plaintiff for the amount of the verdict, and the \$123 to be added thereto.

STATUTE LAWS.

MARYLAND.

AN ACT entitled an Act to repeal sections twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five and thirty-six of Article fifty-six of the Code of Public General Laws, entitled "*Licenses*," sub-title "*Foreign Corporations and Companies*," and to re-enact the same with amendments.

SECTION 1. *Be it enacted by the General Assembly of Maryland.* That sections twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five and thirty-six of Article fifty-six of the Code of Public General Laws, entitled "*Licenses*," sub-title "*Foreign Corporations and Companies*," be and the same are hereby repealed, and the following sections enacted in lieu thereof:

Sec. 27. There is hereby established a distinct bureau in the office of the Comptroller of the Treasury, to be known as the Insurance Department, which shall be charged with the execution of the laws of this State in relation to insurance; and the Comptroller of the Treasury is hereby authorized and directed to assign a clerk in charge of said department, who shall be known as the Insurance Commissioner for the State of Maryland, and who shall receive an annual salary of twenty-five hundred dollars, payable out of the fees of his office, and shall hold his office during the term of the Comptroller making the appointment, or until his successor is appointed and qualified, unless sooner removed by the Comptroller; and the said Insurance Commissioner shall give bond to the State of Maryland in the sum of twenty-five thousand dollars, for the faithful discharge of his duties, and no person who is a director, officer, or agent of, or directly or indirectly interested in any insurance company, except as insured, shall be appointed as such Commissioner by the Comptroller, and the rulings or

decisions made by said Commissioner shall always be subject to revision by the Comptroller.

Sec. 28. It shall be the duty of the Insurance Commissioner—First, to see that all laws of this State respecting insurance companies are faithfully executed, to file in his office every charter or declaration of, or organization of a company, with certificate of the Attorney General, and on application of the corporation, to furnish to them certified copies thereof. Second. He shall, as soon as practicable in each year, calculate or cause to be calculated in his office, the net value, on the thirty-first day of December of the previous year, of all the policies in force on that day, in each Life Insurance Company doing business in this State, organized by authority of this State, and of every other Life Insurance Company doing business in this State, that shall fail to furnish to him, as hereinafter provided, a certificate of the Insurance Commissioner of the State by whose authority the company was organized, or by the State in which it may elect to have its policies valued and its deposit made, in case the company is chartered by the Government of the United States, or by any State not having an Insurance Department, giving the net value of all policies in force in the company on the thirty-first day of December of the preceding year, which calculation of the net value of each policy shall be based upon the American Experience Table of Mortality, and four and one-half per cent. interest per annum; and the net value of a policy at any time shall be taken to be the single net premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the Table of Mortality and rate of interest designated above. Third. In case it is found that any Life Insurance Company doing business in this State has not on hand the net value of all its policies in force, after all other debts of the company and claims against it, exclusive of capital stock, have been provided for, it shall be the duty of the Insurance Commissioner to publish the fact that the then existing condition of the affairs of the company is below the standard of legal safety established by this State, and he shall require the company at once to cease doing new business, and he shall immediately institute proceedings to determine what further shall be done in the case; and it is hereby made the duty of the Insurance Commissioner, after having determined, as above, the amount of the net value of all the policies in force, to see that the company has that amount in safe, legal securities, of the description and character hereafter provided for in this Act, after all its other debts and claims against it, exclusive of capital stock, have been

provided for. Fourth. He shall accept the valuations made by the Insurance Commissioner of the State under whose authority a Life Insurance Company was organized, or that of the State in which it may elect to have its policies valued, when such valuations have been properly made on sound and recognized principles and legal basis not less than the above; *provided*, the company shall furnish to the Insurance Commissioner of this State a certificate from the Insurance Commissioner of such State, setting forth the value, calculated on the data designated above, of all the policies in force in the company on the previous thirty-first day of December, and stating that after all the other debts of the company, and claims against it at that time, were provided for, the company had, in safe securities of the character specified in this Act, an amount equal to the net value of all its policies in force, and that said company is entitled to do business in its own State; and every Life Insurance Company doing business in this State during the year for which the statement is made, that fails promptly to furnish the certificate aforesaid, shall be required to make full detailed list of policies and securities to the Insurance Commissioner of this State, and shall be liable for all charges and expenses consequent upon not having furnished said certificate. Fifth. For every company doing Fire Insurance business in this State, he shall calculate the re-insurance reserve for unexpired fire risks, by taking fifty per cent. of the premiums received on all unexpired risks that have less than one year to run, and a pro rata of all premiums received on risks that have one year or longer to run, and in marine and inland insurance he shall charge all the premiums received on unexpired risks as a re-insurance reserve. *Provided*, that the foregoing requirement of re-insurance reserve when applied to companies organized under the laws of foreign governments shall be calculated only upon the business of such company in the United States, and the basis of the reserve fund so required shall be the assets of such company held and invested in the United States. Sixth. Having charged against the company the re-insurance reserve as above determined, for fire, inland and marine insurance, and adding thereto all debts and claims against the company, he shall, in case he finds the capital stock of the company impaired to the extent of forty per cent., give notice to the company to make good its whole capital stock within sixty days; and if this is not done, he shall require the company to cease to do new business within this State, and shall thereupon, in case the company is organized under authority of this State, immediately institute legal proceedings, as required in this Act, to determine what further shall be

done in the case ; and any company receiving the aforesaid notice of the Insurance Commissioner to make good its whole capital stock within sixty days, shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amount fixed by the charter of said company ; and in case any stockholder of such company shall neglect or refuse to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as the said Insurance Commissioner shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof, to issue new certificates for such number of shares as the said stockholder may be entitled to, in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company ; the value of such shares, for which new certificates shall be issued, to be ascertained under the direction of the said Commissioner, the company paying for the fractional parts of shares ; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to any amount sufficient to make up the original capital of the company. Whenever the capital stock of any joint stock fire or marine insurance company of this State becomes impaired, the Insurance Commissioner may, in his discretion, permit the said company to reduce its capital stock and the par value of its shares in proportion to the extent of impairment ; *Provided*, that in fixing such reduced capital, no sum exceeding twenty-five thousand dollars shall be deducted from the assets and property on hand, which shall be retained as surplus assets ; *and provided further*, that the capital stock shall not be reduced to an amount less than one hundred thousand dollars. And whenever he shall have reason to believe that any company is insolvent or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any non-compliance with the provisions of this Act, he shall make complaint thereof to the judge of the Superior Court of Baltimore city, or any judge of the Circuit Court of the county, where the company or agency may be located, as the case may be, which judge shall, upon the requisition of the Commissioner, appoint a commission, consisting of the Insurance Commissioner and two disinterested and competent persons, whose duty it shall be to examine every detail of the business and condition of said company, and report in writing the result of such examination to the judge appointing them, who shall, if in his judgment the charges of fraud, neglect or abuse, as charged by the Insurance Commission,

is sustained by the said report, at once issue an injunction suspending the business of said company. Seventh. It shall be the duty of the Insurance Commissioner, after he has notified a Life Insurance Company, organized under authority of this State, to cease doing new business until the net value of its policies in force is equal to that called for by the standard of safety established by the State, at once to cause a rigid examination in regard to all the affairs of such company; in case it shall appear that there is no fraud or gross incompetency or recklessness shown to exist in the management, he may, upon publishing the facts in the case, permit such company to continue in charge of its business for one year; *Provided*, there is, in his opinion, reason to believe that the company may eventually be able to re-establish the legal net value of all its policies in force; at the end of the year named above, he may renew the permission, in case, on examination, he is satisfied that the company is likely to retrieve its affairs; but in case the Insurance Commissioner does not permit the company to continue in the control of its old business, it is hereby made his duty to institute the necessary proceedings for the protection of its policy-holders, in accordance with the laws of this State; to publish the result of his examination of the affairs of any company whenever he deems it for the interests of the public so to do, in one or more papers of this State. Eighth. He shall institute, or cause to be instituted, if approved by the Comptroller, the necessary proceedings, under the laws of this State, to close the affairs of any company of this State which shall appear to him, upon examination, to be insolvent or fraudulently conducted; to report in detail, through the

- Comptroller, to the Attorney General, any violation of the laws relative to insurance companies, their officers or agents, or the business of insurance; to furnish to the companies, required by this Act to report to him, the necessary blank forms for the statement required; and at the request of any person, and on payment of the fee, to give certified copies of any record or paper in his office, when he deems it not prejudicial to public interest so to do, and to give such other certificates as this Act provides for. Ninth. He shall preserve in permanent form, a full record of his proceedings, and a concise statement of the condition of each company or agency visited or examined, and report annually to the Comptroller, on or before the first day of December his official acts: the fees received and expenses of his department for the year then to end, and pay into the treasury all excess of receipts over disbursements; the condition of companies doing business in this State, and such other information as will exhibit the af-

fairs of his department, a copy of which report he shall forward to the Insurance Commissioner or other similar officer of every other State, and to each company doing business in this State, and, on request, to communicate to the Insurance Commissioner of any other State, any facts which, by law, it is his duty to ascertain, respecting companies of this State doing business within such other State. Tenth. To adopt and renew, from time to time, when necessary, with the approval of the Governor, a seal of office, an impression and description whereof, with the Governor's certificate of approval, shall be filed with the Secretary of State; and it shall be his duty to see that no company is permitted to insure lives in this State whose charter authorizes it to do fire, marine or inland insurance business. Eleventh. The Insurance Commissioner, for the purposes of examinations authorized by law, has power to summon and examine any person being within this State, under oath, which he may administer, relative to the affairs and condition of any company; or for probable cause, to visit, at its principle office, wherever it may be, any insurance company, not of this State, and doing business in this State, for the purpose of investigating its affairs and condition; and to revoke, with the approval of the Comptroller, its certificate in this State, if it does not permit an examination; to revoke or modify any certificate of authority, when any conditions prescribed by law for granting it no longer exist; and the Insurance Commissioner, with the approval of the Comptroller, has also power to institute suits and prosecutions, either by the Attorney General or such other attorney as the Comptroller may designate, for any violation of this Act, and the Comptroller is a necessary party to any proceedings instituted for the purpose of closing up the affairs of any company, when the same shall not be in the name of the State of Maryland.

Sec. 29. If any person, body politic or corporate, shall make, negotiate, or solicit within this State any contract of insurance, or shall effect an insurance or insurances, or pretend to effect an insurance or insurances, or receive and transmit an offer or offers of insurance or insurances, or receive or deliver a policy or policies of insurance, or connect any other person or persons with them in any policy they may at the time hold, or advertise, or circulate, any card, circulars or notice, open or keep any office for the transaction of said business, without complying fully with all the provisions of this Act, [he] shall be subject to the fines imposed by section thirty-six of this Act; and it shall be the duty of the Comptroller to publish annually, in the month of June, in at least two newspapers, one of which shall be published

in Baltimore city, the names of all general agents authorized to do business in this State, together with the names of the companies they are licensed to represent.

Sec. 30. No declaration of organization, or charter of an insurance company formed under any general law of this State, and no alteration or amendment thereof, shall be operative until it has been submitted to the Attorney General for examination, and found by him to be in accordance with the provisions of this Act, and of such general law, and not inconsistent with the Constitution and laws of this State, and so certified by him and delivered to the Insurance Commissioner, and before any insurance company of this State shall do any business, the Insurance Commissioner shall examine the officers of said company under oath, which examination shall be certified to under oath of said Commissioner, that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such company to the amount of not less than one hundred thousand dollars, has been paid in, in money, and is held by the Board of Directors, subject to their actual control, according to the provisions of the charter of said company, or has been by them invested in securities negotiable, and worth in the market not less than the sum of one hundred thousand dollars, or if a mutual company, that it has received, and is in actual possession of, the promises, or *bona fide* engagements of insurance or other securities, as the case may be, to the full extent, and of the value required by law; and the name and residence of the maker of each premium note forming part of the capital or assets, and the amount of such note, shall be reported to the Insurance Commissioner, and the corporators or officers of such company shall be required to certify under oath, that the capital exhibited to the Insurance Commissioner is *bona fide* property of the company; which certificate shall be filed in the office of the Insurance Commissioner. *Provided, however,* that the provisions of this Act shall not apply to mutual fire insurance companies heretofore chartered by the laws of this State and now doing business; and any officer or the Commissioner swearing falsely in regard to the provisions of this section, shall be deemed guilty of perjury, and shall be subject to the penalty or penalties prescribed for such offense by the laws of this State.

Sec. 31. No person shall act as agent or solicitor in this State for any company not of this State, in any manner whatever relating to risks, until the provisions of this Act have been complied with on the part of the company or association, and there has been granted to

said company or association, by the Insurance Commissioner, a certificate of authority or license, for which said company or association shall pay into the State Treasury the sum of three hundred dollars; and if a tax of one and one-half per cent. on the gross amount of premiums charged or collected for said company or association during the last license year—which report of premiums the agent is required to make under oath to the Insurance Commissioner—shall exceed the price of said license, there shall be paid into the treasury, before a license shall be renewed for the ensuing year, the whole excess of the one and one-half per cent. over and above the cost of the license; *Provided*, that all licenses shall expire on the first day of May in each year, and any company applying for admission into the State shall pay in like proportion for the fractional part of a year. In addition to the above license or tax, there shall be paid by each company doing business in this State the following fees to defray the expenses of executing the provisions of this Act: Upon filing the declaration or certified copy of charter, twenty-five dollars. Upon filing the annual statement or certificate in lieu thereof, twenty dollars. For each certificate of authority (which each sub-agent or solicitor is hereby required to obtain) and certified copy thereof, two dollars. For every copy of any paper filed in the department, the sum of twenty cents per folio; and for affixing the official seal to such copy and certifying to the same, one dollar. For valuing policies of life insurance companies, thirty dollars per million of insurance or any fraction thereof. For official examinations of companies under this Act, the actual expenses incurred. *Provided*, that the filing of the papers with the Insurance Commissioner, as provided by this Act, shall be in lieu of all papers now required by law to be filed with the Comptroller and the Clerk of the Superior Court of Baltimore city.

Sec. 32. Every insurance company, including individuals, partnerships, joint stock associations and corporations conducting any branch of insurance business in this State, must transmit to the Insurance Commissioner a statement of its condition and business for the year ended on the preceding 31st day of December, which statement shall be rendered on the 1st day of January following, or within sixty days thereafter, except that foreign companies shall transmit their statement of business other than that done in the United States, prior to the following first day of July, which statement must be in form and state the particulars required by the blanks prescribed by the Comptroller; and the Insurance Commissioner may require, at any time, statements from any company doing business within this State, or

from any of its officers or agents on such points as he deems necessary and proper, to elicit a full exhibit of its business and standing, all of which statements herein required, must be verified by the signatures and oath of the President or Vice-President, with those of the Secretary or Actuary. No company having neglected to file a statement required of it within the time and manner prescribed, shall do any new business after notification by the Insurance Commissioner, while such neglect continues, and any company or association neglecting to make and transmit any statement required, shall forfeit one hundred dollars for each day's neglect; and any person or company wilfully making a false statement in any report to the Insurance Commissioner, is liable to the fines imposed by section thirty-six of this Act.

Sec. 33. No insurance company, not of this State, nor its agents, shall do business in this State until it has filed with the Insurance Commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Insurance Commissioner, or the party designated by him, or the agent specified by said company, to receive service of process for the company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State, so designated, such process may thereafter be served on the Insurance Commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted so as to require or dispense with service at the office of said company within this State, and that such service of process, according to this stipulation, shall be sufficient personal service on the company; the term process includes any writ, summons or order whereby any action, suit or proceedings shall be commenced, or which shall be issued in, or upon any action, suit or proceedings.

Sec. 34. Before any insurance company shall commence business in this State, the following conditions, in addition to those imposed by the preceding sections of this Act, must be complied with: It must be fully organized. If it be a company not of this State, a copy of its charter, duly accepted, or its declaration of organization, or deed of settlement, duly approved and certified by the Insurance Commissioner or other proper officer of its own State or nation, with his certificate that the company is entitled to assume risks and issue policies therein, must be filed with the Insurance Commissioner of this State. The capital stock of no insurance company,

(mutual insurance companies excepted,) incorporated by this State, or incorporated by the laws of another State or country, and doing business in this State, whether fire, life, marine or inland insurance, shall be less than one hundred thousand dollars. An amount equal to the re-insurance reserve of all insurance companies shall be invested in the bonds or treasury notes of the United States, or bonds or stocks of this or any other State of the United States, or of any incorporated city or corporation of this or any other State, having legal authority to issue the same, bearing interest, or it may be invested in real estate for their office or business purposes only, or on ground-rents, or loaned on mortgages of unencumbered real estate in this or any other State of the United States, worth at least double the amount loaned thereon, exclusive of buildings, except where such buildings are insured, and the policies duly assigned as additional security, or loaned on pledges of any security named in this section or on the policies of the company in force, each loan being less than the net value of the policy on which the loan is made; *Provided, always,* that the current market value of such pledged securities other than the bonds and stocks of this State or of the United States, shall be at all times, during the continuance of such loans, at least ten per cent. more than the sum loaned on them, and all such loans are subject to the power of the company to terminate the same in case of depreciation of the securities below that limit; *And provided,* in all investments made upon mortgaged securities, the evidence of the debt shall accompany the mortgage or deed of trust.

Sec. 35. That whenever the Attorney General of the State, or State's Attorney for the city of Baltimore or for any county in this State, shall be authorized by the Comptroller to institute proceedings against any insurance company, incorporated under the laws of this State, to ascertain whether such corporation has been guilty of such misuse, abuse or non-user of its corporate powers and franchises, as, by law, would authorize and make proper the forfeiture of its charter, corporate powers and franchises, the Attorney General or State's Attorney so authorized, shall file in the Superior Court of Baltimore city, or the Circuit Court of the county, as the case may be, a petition in the name of the State, setting forth fully and in detail the alleged abuse, misuse or non-user, by reason whereof the forfeiture is sought, and upon the filing of such petition the Court, in which it is filed, or any judge thereof, shall lay a rule requiring the said company or corporation to show cause within such time as the said judge may deem proper, why a decree of forfeiture should not be passed as

prayed in said petition ; a copy of which rule and the petition shall be served on the President, Manager, Secretary or some other officer of the said company or corporation, by a day to be therein limited, (not exceeding twenty days,) as other process against such corporations or companies is directed to be served ; and further proceedings shall be had in such cause, in conformity with the Act passed at January Session, 1868, Chapter 471.

Sec. 36. Any person or persons, or any company or association violating any of the provisions of this Act, shall be subject to a fine of not less than one hundred dollars, nor more than one thousand dollars, which fines shall be sued for in the name of the State of Maryland, and collected as all other fines as are imposed by the laws of this State are now collectable, and any Act or part of an Act inconsistent with the provisions of this Act, [?] be and the same are hereby repealed ; *Provided*, that no right of action accrued, or penalty incurred under any existing law repealed by this Act, shall be thereby waived or annulled in any way, but the same may be enforced under said Acts in the same way as if the repealing clause had not been passed ; *And provided further*, that when by the laws of any other State any taxes, fines, penalties, deposits of money or securities, or other obligations or prohibitions are imposed upon insurance companies incorporated or organized under the laws of this State and transacting business in such other State, or upon the agents of such insurance companies, not imposed by the laws of this State, so long as such laws continue in force, the same taxes, fines, penalties, deposits and obligations shall be imposed upon all insurance companies doing business in this State which are incorporated or organized under the laws of such other State, and upon their agent or agents.

SEC. 2. *And be it enacted*, That this Act take effect from and after its passage.

Approved, April 6th, 1872.

MISCELLANEOUS DEPARTMENT.

MORAL DANGERS INCIDENT TO LIFE INSURANCE MANAGEMENT.

The large and growing accumulations, which for the past few years have been so rapidly concentrating in the hands of Insurance corporations, and which until recently they have been at great pains to spread before the people, have of late excited suspicion and alarm. Men are naturally disposed to be jealous of overgrown accumulations in the hands of corporations, whereby the managers of such corporations are enabled to wield a greater power than is compatible with the public safety. In the case of life insurance companies, where so large a number of the people are directly interested, as policy-holders, in the reserves, which the nature of the business requires should be intrusted to the custody of the officers, there is an additional solicitude, which arises from the known weakness of human nature under the peculiar temptations incident to the handling of large sums of money.

In the year 1870 the assets of about eighty life companies in this country amounted in round numbers to \$279,000,000; in 1871 to \$315,000,000, and at the same rate of increase, they will in four years exceed \$500,000,000. Trusts of this magnitude, impose a severe strain upon the infirmities of human nature.

The late legislative investigations into the conduct of the Commissioner of the New York Department have resulted in disclosures of guilty complicity with that officer on the part of the officers and managers of several of the life companies, and of corruption and extravagant management in connection with their own companies, which can not be without effect upon the public mind. The following extracts taken from the report submitted by the majority of the committee to the Legislature of that State at its last session, contain statements of very serious import:

“Facts disclosed by this investigation in relation to the prodigal and extravagant, not to say criminal, use of money in large amounts by many of the companies, to secure selfish ends, are so manifest,

that your committee feel that they would come far short of performing their duty if they fail to condemn, in the most positive manner, the practice which has been pursued by them."

"The prodigality of many of the companies in proffering large fees for examinations, in expending large sums for 'counsel,' and upon outside parties in the performance of doubtful and unwarrantable services, and in contributing to large funds, as in the case of the 'Miller Life Bill,' by which to secure unwise and injurious legislation and to corrupt legislators, should receive the most emphatic condemnation."

"The fact that such large sums have been thus used in an illegal manner, discloses not only corrupt and selfish motives, but an abuse of the various trusts reposed, which must sooner or later destroy all confidence, and effect the overthrow of the entire insurance interests as at present administered."

Great publicity has been given to this New York trial, and the reports both of the majority and minority have had a wide circulation. The fact that the committee were not unanimous in their verdict, furnishes evidence that there were two sides to the question. There is also ground for suspicion that political influence affected in some measure the action of the majority as well as that of the minority. But it is not probable that the public judgment will be materially modified by these considerations, owing to the marked character of the facts upon which the decision of the majority was based. We may not be able, nor is it desirable, to remove from the public mind the impression, which these disclosures, as well as some others recently made, of a more private nature, have produced. A habit of intelligent inquiry and watchfulness on the part of the community, will exert a beneficial influence upon the business of insurance, and upon the companies themselves, and will tend to establish a more truthful and free relation than has heretofore existed between the policy-holders and the officers of the companies, as their fiduciary agents. It is also beginning to be evident that the officers of the insurance departments, those guardians of trustees, will bear watching.

This watchfulness of their own business and interests by the people, is a great restraint upon the dishonesty and faithlessness of corrupt and unprincipled men, who, in all kinds of financial institutions, public and private, manage to secure positions of responsibility and power.

This is not, however, the only influence needed and absolutely required for effectually guarding the interests here involved. The strong protecting power of the law is indispensable. The subject, moreover, is one in which it is peculiarly appropriate that the aid of the law

should be invoked. In the entire range of finance there is not, at the present time another trust relation of so great magnitude, or one that presents so many opportunities for authorized and unauthorized speculation and fraud; nor is there one in which the trustees are so far removed from direct responsibility to the beneficiaries, as are the managers of a life company from its policy-holders. About eighty of these companies, in addition to the \$315,000,000 which, as we have seen, they now hold as assets, expect to collect during the current year, the further sum of more than \$100,000,000. Yet the distance between these companies and the holders of the policies is so great and the connection so remote that their direct personal oversight and care can amount to but very little. It is therefore both necessary and proper that the law should protect their interests.

There always will be, and there are honorable instances of insurance companies whose characters are above suspicion or the necessity of outside influences to hold them to a course of honesty. There are always men so honest and so wise that no temptation can swerve them from the paths of rectitude and duty. But if human nature is sure to repeat itself in history, it is certain that the exceptions of this kind would be comparatively few.

The experience of life insurance in England furnishes an instructive illustration of our remarks, and at the same time, by a comparison with the history of insurance companies in our own country, demonstrates the salutary effect of the American system of insurance legislation. In that country, within the last one hundred and ten years, about 360 companies have been organized, of which only about 110 exist at the present time. More than 250 have ended their careers by failure, in many cases entailing heavy losses upon their policy-holders. In the United States, thus far, about 20 companies have discontinued business by failure or re-insurance, but in these cases, with perhaps a single exception, that of the Ohio Life and Trust Company, whose failure occurred many years ago, and before the present system of insurance legislation had been developed, very small losses have fallen upon the holders of policies, and scarcely any serious effects have resulted to the financial interests of the country. Our laws have thus far guarded the people against the disasters which have marked the history of the English companies. This has been done through the adoption of legal standards of safety; by requiring regular statements and reports of their condition from the companies, and by conferring upon the officers of the insurance departments summary power to enforce these requirements and to make official examinations, and

without delay to stop the business and wind up the affairs of unsound companies. These provisions, which have thus far guarded so effectually the interests of the country, may well reassure the people of the safety of their insurance investments, and allay any undue feelings of distrust that may have too hastily arisen.

The events of the times, however indicate that the legal guardianship, which the State has assumed to hold over the companies, is not yet so efficient or so complete as to afford that entire protection to the community and the 800,000 policy-holders in the United States, which the magnitude of the interests and the rights of the policy-holders demand. Some points have been left unguarded, and the change and expansion of business has developed others, which demand the immediate attention of our legislators. We can at present only indicate one or two directions in which legislation seems to be particularly needed.

In addition to the mortuary reserves, which the law guards so carefully, there are immense margins resulting from the premium loadings, which are held by the companies to meet current expenses. These margins, which amount to \$30,000,000 or \$40,000,000 annually, are far in excess of any expected or reasonable demands for wise and necessary expenditures, and afford a wide range for waste and extravagance, without trespassing upon the mortuary funds. Yet they are the property of the policy-holders, and should be accounted for specifically in the annual reports of the companies. At present, as the companies are not required to report their net premium, as well as their gross premium income, no one knows or is able to know how large these margins are or to know precisely how they are used, and if any holder of a policy were to attempt an investigation, on his own account, in any life office, it would be treated as an impertinent intrusion. It is from these vast margins that the corruption fund referred to in the report of the New York committee was taken, and hence also are derived the salaries to officers, which the New York investigating committee had reason to believe equalled, in some cases, that of the President of the United States. It is therefore necessary, for the purity of our legislation, as well as the protection of our citizens, that the State should hold these irregular revenues under a supervision no less rigid and severe than that by which it guards the mortuary reserves.

While we have thus far been singularly fortunate in our freedom from thefts and embezzlements, on the part of those intrusted with insurance deposits, yet that no possible means of protection may be omit-

ted, additional safeguards should be afforded by the passage of stringent laws with severe penalties, against any dishonest or fraudulent acts on the part of those holding positions in insurance companies or having the control and handling of the funds intrusted to their care.

It is not inconsistent for us, in closing this article, to congratulate the people of our country upon the character of our insurance institutions, and the firm hold insurance has acquired upon the confidence of the people, as one of the most beneficent elements of our civilization and progress. Our insurance companies have almost without exception fulfilled their policy engagements, and that with a good measure of faithfulness to the interests of their policy-holders; while many of our best companies have shown a sagacity and faithfulness in the management of their trust deposits, and a conscientious regard for their duties toward their policy-holders never excelled, and rarely equalled by corporations or individuals. It is owing to the excellent management of many of our companies, and the fair management of the majority—the bad management of comparatively a few being the exception—that life insurance commands to such an extent the confidence of the public, and the respect of the financial circles of the country.

CO-OPERATIVE INSURANCE.

The co-operative spirit of the age, and the desire for cheap insurance, have brought into existence a class of societies, some of which are simply voluntary and social, others regularly organized as legal corporations, whose object is to provide certain reversionary endowments for the members, as they may severally die, by assessments of one dollar or more upon the surviving members. In social leagues it is the usual practice to collect the assessments after the occurring of the death. In some corporate societies, however, they are collected in advance, in order that a decedent fund may be created, and be ready for use whenever a loss may occur.

The plan of reciprocal contribution for mortuary purposes has been carried into effect in the Masonic order and the order of Odd Fellows, also among clergymen, and in communities consisting of railroad conductors and employees, with results that are reported to be reasonably satisfactory. Outside of communities in which the members are bound together by some special ties of fellowship or of common interest, corporate associations, doing business on the co-operative principle, have thus far failed to secure general favor and confidence.

The formation of co-operative insurance companies has called forth

very earnest discussion in various quarters, not always conducted in a spirit of candor. While insurance companies should, from their very nature, be conservative, and while one of their greatest dangers lies in the adoption, without due consideration, of new theories and "improved methods," it is a fact universally acknowledged that the business of insurance is yet in its infancy; that radical improvements are to be expected, and that grave evils and abuses exist, which are threatening the existence of many companies, and jeopardizing the interests of their policy-holders and the public. It therefore becomes insurance writers and the officers of insurance companies to treat any new question that may honestly arise, in a respectful and candid manner. We have no sympathy with the abusive style which characterizes many insurance publications, in their treatment of the co-operative question.

The main position taken by the friends of the co-operative system is, that the large reservations, which are held by the life companies, are not necessary to a sound insurance, and that the withdrawal of such an amount of capital from natural circulation, and locking it up in the hands of fiduciary and non-producing corporations, is a serious detriment to the financial welfare of the country. They further maintain that the benefits disbursed are inconsiderable in comparison with the amounts collected and reserved, and the cost of management. If, say they, it is necessary, under the existing system, that these corporations should hold in trust the enormous sum of \$315,611,163, and collect from the people annually the sum of \$116,189,419, and expend on management the sum of \$18,204,597, for the purpose of providing the comparatively small sum of \$22,060,660 for the benefit of decedent estates, is it not evident that a system which is so ponderous can not be financially wise, and if it be possible to invent a system that will secure the ends of insurance, and at the same time liberate for common circulation these large sums of money, should not such an invention be hailed as an incalculable blessing to society?

This argument, which is taken for substance from the publications of the co-operative companies, and particularly from Prof. Twining's report on the National Life of Chicago, the ablest and most elaborate article that has appeared upon co-operative insurance, is calculated to secure the attention of the public to any proposal which these companies may make for remedying the evils complained of. If the co-operative companies are able to solve the problem of life insurance, without the reserve and at reduced cost, and with satisfactory security for the full value of the proposed mortuary reversion, and to save themselves from the tendency to disintegration, which seems incident to

their system, they will be entitled to the gratitude of mankind. Herein lies the *experimentum crucis*. Have they achieved the result? Can the public trust the new system to the full extent of its pretensions? These are questions which an appeal to facts, as drawn from co-operative reports and other documents will help us to decide.

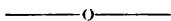
In respect to social communities, it may be admitted in absence of official reports, that valuable benefits have often accrued to the families of deceased members. In the case of corporate societies, which render annual accounts, like other insurance companies, to the State departments, it appears from the published reports, as well as the official publications of the companies themselves, that the co-operative system contains no guaranty of any fixed value to the reversionary memberships. In the event of death, the amount realized is conditioned upon the number of paying members at the time, which is always indeterminate. In practice it is found that this fluctuation has a wide range. The experience of the National Life of Chicago, confessedly the best ordered and most trustworthy of all the co-operative institutions of the day, furnishes an illustration. According to the report of that company for 1871, the number of policies issued in that year was 8,240; the number of lapsed policies was 5,942; the total number of policies remaining in force at the end of the year, 5,296, which is 2,944 less than the total number of policies issued. This tendency to class depletion, involves a corresponding depreciation of the value of the mortuary reversions. Every lapsed policy in the company deducts one dollar from the value of each decedent claim. 5,942 lapses distributed among the several classes must have entailed a heavy depreciation upon the decedent reversions of the year.

This liability to fluctuation involves a degree of uncertainty, which, to say the least, detracts very seriously from the value of a co-operative membership, and is utterly irremediable in any system in which the value of the reversion is dependent upon the amount that may be raised by assessment on a class that fluctuates in the number of its memberships. In ordinary insurance it matters not whether there be a hundred or a thousand persons in the association, because the amount provided for in the premium is always equal to the death liability.

It appears, further, that the company above named has paid during the entire period of its existence in benefits to 39 decedent memberships, the sum of \$71,251, which gives an average of about \$1,207 to each death claim, or about \$1,300 less than the nominal value of a

membership in a full class of 2,500 persons. But the classes have never been full, and experience thus far indicates that they cannot be expected to average more than twelve or fourteen hundred reliable members.

In this state of affairs it is obviously unsafe, for a company, on such a basis, to claim or to hold out the pretension that the value of a decedent reversion will be much in excess of one-half the nominal value of a membership. This conclusion is established by the irresistible logic of facts and figures, and it must be accepted by the advocates of co-operative insurance as a truth, which affects fundamentally the merits of the system and its practical utility. Experience has shown that in trustworthy and able hands co-operative insurance is not necessarily worthless or dangerous. Most of these companies are, however, notoriously unreliable, and the system, in its present unguarded condition, affords peculiar opportunities to dishonest and unscrupulous men for imposing upon and defrauding the public. Its great need is security against disintegration and decay. It requires, also, special guards on the part of the company managers and the State government.



CASES REPORTED.

A full report of the decisions in nine insurance cases is given in this number.

In *Hall et al. vs. The Nashville & Chattanooga Railroad Co.*, decided in the United States Supreme Court, the relative rights of a common carrier and the owner and the insurer of the goods were called in question. The plaintiffs shipped a lot of cotton, valued at \$10,000, by the defendant, having insured the same in the Kentucky Marine and Fire Insurance Company, and the Union Insurance Company, of Louisville. The property was destroyed by fire, and the insurance companies paid the owner the amount insured. The suit was originally brought in the United States Circuit Court for the Middle District of Tennessee, in 1867, in the plaintiffs' names, for the use of the insurance companies. The Supreme Court held that the liability for the loss was primarily upon the carrier; that the insurer was subrogated to the rights of the owners, and might bring an action against the carrier in the names of the owners. It was also held that there is no reason for subrogation in the case of marine policies that does not exist in the case of fire policies by land, and that where the fire by which the goods were destroyed was accidental the carrier was responsible. The

judgment of the court below was reversed. We are under obligations to Wm. Atwood, Esq., of Louisville, attorney for the plaintiffs in error, for the facts in the case.

In the case of *Harding vs. The Town of Townshend*, decided in the Supreme Court of Vermont, the plaintiff brought suit against the town for injuries sustained by an accident occasioned by the unsafe condition of the highway. The court held that the money he had received from an insurance company on account of the same accident was no defense on the part of the town, in the suit.

The case of *The Hartford Insurance Company vs. The State of Kansas* has attracted considerable attention, on account of the feeling that had existed between the Insurance Department of Kansas and insurance companies from other States, in regard to the validity of certificates issued by the State Auditor, and the question of vested rights under these certificates, if valid. This was made a test case. The Supreme Court of that State held that, until the required fee was paid into the State Treasury the Auditor had no right to issue his certificate; that the payment to the Auditor was not a payment to the State, and that on account of non-payment, the certificate was void. The decision of this point rendered it unnecessary for the court to take up the second, and by far the most interesting point.

The decision in the *Phoenix Mutual Life Insurance Company vs. Bailey* was rendered in the United States Supreme Court. The court held that the contract of life insurance is not one merely of indemnity for a pecuniary loss, as in marine and fire policies, and that a life policy is valid if the relation, whether of consanguinity or affinity, was such as warrants the conclusion that the beneficiary had an interest in the life of the assured, whether pecuniary or arising from dependence or natural affection.

In the case of *The Phoenix Insurance Company vs. Hoffheimer Bros. & Co.*, the Supreme Court of Mississippi affirms the decision in *Oliver vs. M. C. Marine Ins. Co.*, that where a company issues a policy to a known agent, it must insert such words in regard to such agency as are necessary to make the contract binding. The court also held that it was competent for the court below to reform the policy, made on the agent's own account, in such a manner as to cover the interests of the real parties, and to render judgment on the policy so reformed.

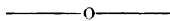
In the *Phoenix Insurance Company vs. Slaughter*, decided in the United States Supreme Court, the question, which was in regard to

the right to keep gunpowder upon the premises, turned upon the punctuation of the provision upon that subject in the policy. The judge justly remarks that good faith requires that if insurance companies do not intend to take risks on property where gunpowder &c. are kept, they should declare their intention in terms which cannot admit of controversy, and that they should employ type large enough to arrest the attention of persons insuring.

In *Plimpton vs. The Farmers' Mutual Fire Ins. Co. & Mundell*, the defendant, Mundell, secured insurance on his buildings in his own name and for his own benefit. Afterwards the plaintiff brought suit, and by levy of execution acquired title to the premises. Subsequently, the buildings were destroyed by fire. The Supreme Court of Vermont, held that the title to the premises gave the plaintiff no legal or equitable claim to the insurance.

In *Semmes, Adm'r, vs. The City Fire Ins. Co. of Hartford*, the insured was a citizen of Mississippi. The loss occurred during the war. The policy contained a clause that no suit or action upon it should be sustainable unless commenced within twelve months after the loss should occur. The United States Supreme Court reversed the judgment of the court below, and held that the disability to sue, imposed on the plaintiff by the war, relieves him from the consequences of failing to sue within the twelve months after the loss, and that the period of twelve months does not open so as to receive within itself the three or four years of legal disability, created by the war, and afterwards complete itself as though the war had never occurred.

In *Waring et al. vs. The Indemnity Fire Ins. Co.*, the plaintiffs, commission merchants, sold oil on store in the United States bonded warehouse, and by delivery of invoices and gaugers' certificates, had made complete delivery according to the custom of the trade, and had received their pay. The oil remained on store at the same place without expense to the vendee, until it was destroyed by fire. The policy insured the plaintiffs against loss or damage on oil, their own, or held on trust, on commission, or sold but not removed, contained in bonded warehouse. The New York Court of Appeals held that the policy covered the oil, and that the recovery was in trust for the vendees.



INSURANCE LEGISLATION.

MARYLAND.—This Act, approved last month, creates an Insurance Department to be placed under the charge of a clerk of the Comptroller of the Treasury, who is to be known as "Insurance Commis-

sioner for the State of Maryland." Among other things, the act also provides for the valuation of life policies, and for a basis of reserve for fire and marine companies; for the manner of proceeding against insolvent and doubtful companies, of organizing new companies, and for annual statements. We shall give a full abstract of the act in next number.

HON. WILLIAM BARNES.

The name of this gentleman is familiar to the American public from his honorable connection with the Insurance Department of New York, in the earliest and best days of its history. To him belongs the credit, to a great extent, of securing for that State the enviable reputation she enjoyed for the character of her Insurance Department and her insurance corporations, until her fair name was tarnished by the recent disgraceful disclosures. But political influence caused his office to be taken from him and given to another, and he retired to private life in the enjoyment of more than a national reputation.

Soon after Mr. Barnes' retirement from the office of Superintendent, an engagement was entered into between a prominent insurance company and himself, which continued until its abrupt termination a few weeks since.

In the character of the relations which Mr. Barnes held to that company, and the manner in which those relations were terminated, the public have an interest, not only on account of the personal attacks to which he has been subjected, but especially as showing something of the inside history and character of the company.

The Life Association of America chanced at this time to be passing through one of the crises of its history. The peculiarities of its management, the character of some of its original plans, and the hostile spirit it had shown towards other companies, had involved it in difficulty. Among other things, the Association had begun to issue its "Investment Policies," so-called, the history of which has never been written, and is known to but few. The character of these investment policies, in particular, had occasioned charges of fraud to be circulated against the Association, and the impression which these charges were making upon the public, compelled the managers of the company to take immediate and decisive measures for its relief. The attempted refutation of the charges made against the company, and the public denial of the existence and the issuing of the investment policies, were not sufficient. The Secretary of the company, with characteristic sagacity and boldness, immediately opened negotiations

with Wm. Barnes, and by the inducement of a salary of \$15,000 or \$20,000 per annum, secured the real support of his reputation and influence, and his nominal services as Consulting Actuary. The name of Mr. Barnes and his report were circulated and advertised, after the manner of the Association, regardless of expense. To this use of Mr. Barnes' name and services, the temporary relief, and much of the subsequent business success of the Association are to be attributed. But other Pharaohs having arisen in the Association, the occasion for Mr. Barnes' special services having passed, and public comment having arisen on account of the enormous salary it was said Mr. Barnes was receiving, and the present managers not having the skill and ability to utilize Mr. Barnes' reputation and influence, they began to tire of him, and only an opportunity and a moderate pressure were necessary to make them ready for a separation. The opportunity and more than a moderate pressure were afforded.

Mr. Barnes had become involved in the contest connected with the Miller investigation, and had identified himself with those who presented and supported the charges against Mr. Miller, upon which he was finally convicted, and on account of which he at last resigned, to save himself from the deeper disgrace of an involuntary removal. At the same time, also, that the investigation of Mr. Miller's official conduct was going on before the Legislature of New York, another investigation was going on in which Mr. Barnes was individually involved—that of the Life Association's affairs, by its New York Board of Directors. A feeling of intense hostility had existed between several of the New York companies and the Association. For some *mysterious* reason the officers of several of these companies had taken sides with Mr. Miller, in the Legislative investigations, and were using all their influence to impede the examination, and break down the prosecution, and they were extremely hostile to Mr. Barnes, as the recognized leader of the Miller investigation. It is also said that a personal hostility of long standing existed towards Mr. Barnes on the part of one of the actuaries, who were investigating the affairs of the Association, and from whom a report was expected.

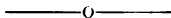
The anxiety of the Association's managers, at the Home Office, caused by the investigation of the New York Board was intense. They were in no condition to disregard the hostility of other companies, and needed some one upon whom to cast the blame for the wrongs to be revealed. In this situation they were willing to sacrifice their "Consulting Actuary," and he was pre-emptorily requested to resign. Mr. Barnes immediately complied with the request, and sent in his resignation. Thus terminated, unhappily, and without mutual

respect or good will, an official relation, which was as violently ruptured by the Life Association in the end as it was eagerly sought by them in the beginning.

The only charge made against Mr. Barnes by the managers of the Life Association, and the only reason given by them for his removal, is that he had involved the Association in difficulty by the part he had taken in the Miller prosecution.

Thus, for the course he has seen fit to take in a legislative investigation, involving the integrity of an insurance department, and for his fidelity to a cause to which he had devoted his life, was Mr. Barnes abandoned by the company, who owed their salvation to the support they had derived from his aid and influence. His motives have been impugned before the public, and he has been subjected to much undeserved censure, and even to abuse in some insurance publications.

Mr. Barnes needs nothing more than the verdict of the investigating committee, the action of the New York Legislature, and Mr. Miller's resignation, for his justification, and to establish his claim to the gratitude of the public.



EDITORIAL ITEMS.

ONE of the Editors of the JOURNAL, Luther H. Potter, will hereafter reside in New York, and the principal office of the JOURNAL will be in that city.

WE dislike apologies, and dislike to make them. But a few words are due to our subscribers for present and past delays in the appearance of the JOURNAL. The inherent difficulties, and the amount of labor necessary in starting and establishing such a journal, and in doing it as it should be done, are much greater than any one would at first suppose. Unforeseen circumstances have also interrupted us on more than one occasion.

With the present number we begin to print the JOURNAL upon our own type, and under our own direct management. This will not only enable us to secure satisfactory typographical execution and uniformity of style, but will in future relieve us from delays and disappointments beyond

our control. We can assure our subscribers that by the end of the year they will receive the volume complete. We trust their satisfaction with the character of the JOURNAL will to some extent atone for the want of promptness in its appearance.

WE shall in future give more prominence to the Miscellaneous Department. We intend to make it fill the place of a first class journal of Insurance and Legal news. While our room is limited, we shall endeavor to make up for want of space, by the character of the articles, and by care and judgment in selecting. Under the head of "Current Topics," we shall notice various matters of transient interest, and such as will hardly be considered worthy of preservation. The pages thus occupied will be in addition to the regular eighty pages, and will be included in the advertising forms, to be omitted in binding. They will, however, be paged in brackets so that those who wish to bind them can do so.

BOOKS RECEIVED.

SHARPSTEIN'S DIGEST.—"A Digest of the American, English, Scotch and Irish Reports of Life and Accident Insurance Cases. By John R. Sharpstein, of the San Francisco Bar. San Francisco. Sumner, Whitney & Co. 1872.

INSURANCE REPORT.—"Seventeenth Annual Report of the Insurance Commissioner of the Commonwealth of Massachusetts. January 1st, 1872. Part 1; Fire and Marine Insurance." Julius L. Clarke, Commissioner.

INSURANCE REPORT.—"Fourth Annual Report of Insurance of the State of Maine. January 1st, 1872." Albert W. Paine, Commissioner.

BOOK NOTICES.

INSURANCE REPORT OF MAINE.—"The last Annual Report of Insurance for Maine, in addition to the tabular statements of business, always found in the Department Reports, contains a full discussion of a variety of topics, which cannot here be noticed as their importance deserves. The views of the Commissioner, Hon. Albert W. Paine, on the "tests of solvency," in a fire company, and on one or two other subjects, are peculiar. His remarks on the extravagant expenses of Life Insurance Companies are bold, and deserve attention. He says, "No other public trust is administered with half the relative extravagance. The figures of the accompanying abstracts tell a most woeful tale, often presenting the death claims a minor item of expenditure in the contrast. It may be safely predicted that the public will not consent to sustain and patronize any system of a benevolent or business character, the cost of administering which so overleaps its usefulness in meeting the professed ends of its establishment."

After giving statistics, the Commissioner remarks: "These figures tell the whole story of what is wanted, viz.: fewer companies."

The "Domestic Companies" that have done business in the State during the last year consist of 1 Mutual Life, 3 Stock Marine, 3 Stock Fire and Marine, and 2 Mutual Marine companies. The list of "Foreign Companies" includes 54 Life, 67 Fire, and Fire and Marine companies, and 1 Accident company.

INSURANCE REPORT OF MASSACHUSETTS.—"The Seventeenth Annual Report of the Commissioner, Hon. Julius L. Clarke, on Fire and Marine Insurance, contains the usual summary of the Fire and Marine business done in that State during the year 1871, and after eliminating the companies which either failed or withdrew from the State in consequence of the great fire in Chicago, presents the following statement of the net results:

"As the net result of admissions and withdrawals, the number of companies now authorized to do business in the State is reduced to 183, or 12 less than at the close of the last report. Of these 98 are home companies; 79 are from other States, and 6 from Great Britain. The present local classification of those from other States, shows that 48 are from the State of New York; 8 from Connecticut, 8 from Pennsylvania, 6 from Ohio, 4 from Rhode Island, 3 from Maine, 2 from California."

The financial analysis of the several companies is complete in details, so that the status of each company may easily be understood. This has required more than ordinary care and labor, on account of the disturbing effects of the Chicago disaster.

The Commissioner notes as a gratifying fact, "that among all the financial institutions of this country, the insurance companies have been pre-eminently free from losses by peculations or defalcations on the part of officers." But as a further safe-guard, he recommends the general adoption of a plan of monthly examinations by a committee on assets, which has been in use with marked good effect for many years in the office of the Continental (Fire) Insurance Company, of New York. The Committee on Assets consists of three persons, one of whom goes out every month, leaving a vacancy to be supplied at every monthly meeting of the

Board of Directors. It is the duty of this committee to make a critical examination of the financial status of the company, as often as they may deem best, but not less frequently than once a month, and to report the same to the Directors, at their monthly meeting. Under such a system of surveillance, it is impossible that any serious speculation or defalcation should occur.

MISCELLANEOUS.

SUICIDE.

The following syllabus of the charge of Mayer, P. J., delivered May 8th, 1872, is from the *Legal Gazette*, which contains the charge in full. The action was on a policy for \$5,000, which contained the provision that "if the insured shall die by his own hand, the policy to be void and of no effect." The death of the insured was caused by a pistol fired by himself. It was claimed by the plaintiff that he was insane at the time of the act. The jury rendered a verdict for the plaintiff.

COURT OF COMMON PLEAS, BLAIR CO., PA.

Isett's Admr., vs. The American Life Ins. Co.

1. The law presumes every person to be sane, and the burden of proving insanity is upon the person alleging it.
2. That if Isett destroyed his life because he was suffering some physical infirmity, for the purpose of terminating his sufferings, there can be no recovery.
3. That if Isett, at the time of his death, was conscious that his death would follow the discharge of the pistol in his hands, there can be no recovery, though he was laboring under mental depression or disturbance of mind.
4. Suicide is not of itself evidence of insanity, but is to be taken with other facts and circumstances in the case.
5. The policy, with all its clauses and conditions, is the contract between the insurer and insured, and must be construed strictly.

CONTESTING THE PAYMENT OF POLICIES.

Scarcely a policy is issued which does not contain conditions upon which its payment is to be forfeited. No company

agrees to be responsible, unconditionally, for every conceivable loss, nor would it, for a moment, consider itself justified, unless its policy contained a provision against those risks and dangers from fraud and mistake, to which companies are constantly exposed. For instance, in life insurance the policies provide that the assured shall be bound by his own statements, made in his application. This is a provision of the greatest importance, and is eminently just and proper. The business of the company cannot be carried on by its officers directly. It must be scattered over the length and breadth of the land, and conducted mainly through local agents. These agents, however, as well as the examining physician, can be depended upon only to a certain extent. There are, from the nature of the case, many material facts in regard to the person to be assured, for which the company must rely entirely upon his own statements; and besides, as insurance business is now conducted, and perhaps necessarily, under any system of management, the interests of the agent, and more or less those of the physician, are in conflict with those of the company. It is but just and necessary, then, that the assured should be held to the strictest responsibility for his representations, and if they are untrue, whether intentionally so or not, he should be the one to suffer. And in fire, marine, and every other kind of insurance, the same holds true of the representations, made by the party insured, in regard to the nature of the risk, the character and ownership of the property, and such other facts as may be called for. Such is the theory, but in practice many companies are in the constant habit of paying losses, where there is not the least legal claim against them, and in direct opposition to the provisions of the policy. Thus the stability of the company is hazarded, the security of the policy-holders put in jeopardy, their money squandered, and the judgment of the people vitiated.

This evil arises mainly from the vicious ambition to "get business." In the scramble for business and race for policies, that has characterized the history of insurance for the past few years, many companies

seem to have ignored the force of these protective provisions in their policies, and have made indecent haste to pay all losses, lest refusal or delay should injure their popularity and prejudice the public against them—a significant commentary upon the character of the companies and of the public. No wonder that insurance companies fail, and that insurance has scarcely risen to the dignity and privilege of a legitimate business in this country.

Companies sometimes claim to act thus from principles of policy and notions of economy. They say that they will be compelled to pay in the end, and that juries will always decide in any contested case against the company, and that they will lose more by standing a suit than they will gain. If this is so, and to a certain extent it is, insurance companies themselves are responsible for it. People have seen these provisions standing as a dead letter, and have become educated to regard them as of no account. They have come to consider a policy of insurance so simple a thing, that they need exercise no particular care in accepting it. Persons who would never think of entering into a contract, affecting the title to real estate, without professional advice, scarcely take a thought about an insurance policy. They seem to suppose that the bargain is all on one side, and that they have no responsibilities in the matter. They regard the company as a mint of money and ready to pay out any amount without troubling itself about how it goes, while rogues and scoundrels expect to realize upon an old steamboat or an unsalable stock of goods, in hard times, or a bogus death, with impunity.

While payments justly due to widows and orphans, or those who have suffered from the misfortunes of fire or accident, should never be disputed or delayed, and while companies should offer every aid and facility to such persons for proving their losses, and for complying with the provisions of the law, it is equally a duty they owe to their policy-holders and the great interests of insurance, to see that the funds they hold in trust are not dissipated by inefficient management or consumed by fraud.

Insurance companies should have courage and principle enough to contest unjust claims, and even if unsuccessful in avoiding payment, should be willing to continue resistance from a sense of justice, and for the purpose of enlightening the people. When they do this they will find fewer fraudulent applications and losses, and less disposition on the part of their agents to encourage such applications; juries, too, will become more enlightened as public sentiment changes. Courts are great educators of the people, and no well-contested case will be without its effect, which will in the end repay all it may cost. When the ruinous practice of which we have spoken has destroyed itself, and people come to apply common sense and the principles which govern them in other things, to insurance and insurance companies, and to consider that a great amount of business done is no criterion of safety, but may be an indication of recklessness and danger, they will appreciate the conduct of those companies, that in the face of obloquy, have sacrificed popularity to principle, and those companies will then reap the fruits of their present course, in the confidence of the public.—*Western Ins. Review.*

A CONGRESS OF LAWYERS.

Not long since there was a Congress of Lawyers held in Germany, for the purpose of taking into consideration the state of the laws; of correcting and reforming the inequalities and abuses under those laws; and in general of discussing measures which were thought interesting or useful to the profession. The idea of such a Congress is excellent, and has been approved of by lawyers and journals in various parts of the world. This is evidently the age of conventions and assemblies. We have agricultural, labor and peace conventions, international musical jubilees, world fairs, industrial expositions, secret society meetings, etc., etc. The assembling of representatives of the clerical and medical professions is almost of weekly occurrence, but as yet there has been no effort to assemble the representatives of the bar in general council. It strikes us that it would be of great advantage

to the profession, both in a moral and mental point of view, to meet at certain intervals; talk over subjects of common interest; try to generalize the laws as far as possible; get rid of intensely local and partisan legislation in different States; obtain more uniformity in the decisions of the State courts; establish a personal acquaintance among the representatives of the bar throughout the whole country, and accomplish many other useful and desirable results. If bar associations could be organized in each county of a State, if such bar associations would hold State Conventions of their representatives at certain designated intervals, if such State Conventions would call a National Congress of lawyers, what an immense amount of good might be accomplished? Instead of the bar, as is unfortunately the case, being merely local in its character and influence, it would assume the rank and position to which its great array of talent, its learned composition and the immense number of its members justly entitle it, in the legislation and administration of the laws of the country.

We throw out the suggestion, let our judges and lawyers think of it. In Pennsylvania we can with propriety commence the organization. The Centennial Exhibition, which will be international in its character, is to be held in Philadelphia, in 1876. Why not organize county bar associations throughout this State, call a State Convention of lawyers, invite our sister States to do likewise, and then, when a complete organization has been effected, call a National Congress of lawyers, and through it invite the bar of the *whole world* to send delegates to an International Congress of lawyers to be held during the Centennial Celebration in 1876?—*Legal Gazette*.

BLACKMAILING JOURNALISM.

The following extracts are taken from the remarks of the *American Builder*, upon the Insurance Journals of the country:

"There is unquestionably a necessity existing for this class of publications; and they have done, and are still doing, a vast amount of good. They furnish a medium

of communication between officers and agents; aid in securing the enactment of just and wholesome laws for the regulation of the business; expose attempts at fraud, and, in short, by calling public attention to the relative soundness of companies, compel the companies to use economy, and keep on hand a larger surplus than they otherwise would. * * As to the patronage which the better class of these journals receives in advertising, it is not more than what is justly their due; the companies could afford to bestow it even if the advertising was worth nothing to them. But insurance companies grow and prosper in the ratio that they secure and educate for the business trustworthy agents, and for this reason there is no class of papers in which it pays them so well to advertise as in those devoted exclusively to insurance."

"But, unfortunately for the reputable portion of the insurance press, and very unpleasant indeed is it to the companies, there is a class of men engaged in publishing insurance newspapers who are a disgrace to the profession of journalism. As a rule these men were not educated to the insurance business, and know little or nothing of it. They were attracted to it by the tempting display of loaves and fishes to be had in the shape of advertising. They publish papers not so much for circulation as for printing advertisements. * * * If a company fails to "come down" there is at once a rumor on the street that there is to be a grand *expose*! The editor has learned certain facts concerning the company, which if made public, will seriously damage its business. Very likely, if these threats fail, a scurrilous article is issued, printed in the form of a leaflet, and sent out over the country. Agents of rival companies seize upon it—for, whether true or not, it will answer their purpose—and possibly a most excellent company is injured in business to the amount of thousands of dollars."

"Now, these are facts. The officers of many respectable life insurance companies declare it cheaper to pay these guerrillas their price than to offend them. A very pretty state of things! Verily such officers deserve to be cashiered before another

er day older. A man who will threaten to attack a reputable insurance company because it fails to advertise in his journal, is no better than the man who attempts to rob on the highway."

REPORT OF THE MILLER INVESTIGATION.

We give the following extracts from the report of the Standing Committee on Insurance to the Legislature of New York. This committee was authorized by the House to investigate the charges against George W. Miller, the Superintendent of the Insurance Department of that State. The resolution requiring the investigation was the result of a recommendation in the Governor's Message. The report was made April 14th, and was signed by all the Republican members of the committee. The committee say :

"Facts disclosed by this investigation in relation to the prodigal and extravagant, not to say criminal, use of money in large amounts by many of the companies to secure selfish ends, are so manifest, that your committee feel that they would come far short of performing their duty if they fail to condemn in the most positive manner, the practice which has been pursued by them."

"The prodigality of many of the companies in proffering large fees for examinations, in expending large sums for 'counsel,' and upon outside parties in the performance of doubtful and unwarrantable services, and in contributing to large funds, as in the case of the 'Miller Life Bill,' by which to secure unwise and injurious legislation and to corrupt legislators, should receive the most emphatic condemnation." "The fact that such large sums have been thus used in an illegal manner, discloses not only corrupt and selfish motives, but an abuse of the various trusts reposed, which must sooner or later destroy all confidence, and effect the overthrow of the entire insurance interest as at present administered. In some instances insurance officers are believed to receive a salary equal to the President of the United States."

"In conclusion, your committee desire

to say that to their minds it has been proved, among other things, to their entire satisfaction—

First, That the said Superintendent has received and appropriated to his own use the fee of one fifth of one per cent. on transfer of securities, which he claims he is legally entitled to.

Second, That he has without authority of law, received, and in some cases charged, for his own use, sums largely in excess of his legitimate expenses in making special and other examinations of companies, and that he has likewise received large sums in payment for his services in making such examinations.

Third, That he has allowed clerks in the department, who are paid regular salaries by the State, to charge and receive illegal and excessive fees for making special and other examinations.

Fourth, That he has appointed commissioners to make examinations, who have received large and excessive fees, entailing great expense upon the companies.

Fifth, That the department has been so managed that many of the companies have believed it necessary to employ brokers and attorneys who were known to be on intimate terms and favorites with the Superintendent, to obtain examinations and protect the interests of their companies, and the payment of large sums for their personal influence in that behalf.

Sixth, That the testimony tends to show that he has received through H. C. Southwick, Jr., a commission of twenty per cent. on the printing of the Insurance Department.

Seventh, That he has withheld from the State treasury the fees belonging to the department, and which should have been paid into the State treasury within a reasonable time.

Eighth, That \$20,000 was raised by seven companies for improper legislative purposes last winter, to secure the passage of what was known as the 'Miller Life Act,' a bill conferring extraordinary powers upon the Superintendent, and that the Superintendent was cognizant of the use thereof.

The evidence herewith presented is vol-

uminous and instructive in more points than one.

Your committee have herein fully expressed their opinions upon the various points of investigation without prejudice against the Superintendent, and yet with a desire fully and fairly to represent the testimony.

Possibly different individuals, equally honest, may arrive at different conclusions.

The laws in relation to examinations of insurance companies are very lax, and abuses have grown up under them, which the legislature should at once correct by the passage of adequate and stringent laws, as suggested in the body of this report. Whether the Superintendent has been guilty of intentional violation of law, and whether or not he shall be removed from office, are questions which we leave to the consideration and wisdom of the House.

All of which is respectfully submitted.

J. W. LIPPITT, *Chairman*,

W. H. ENOS,

I. H. BABCOCK,

A. L. VAN DUZEN,

F. W. TOBEY.

NEW RULES IN ADMIRALTY.

In speaking of the New Rules in Admiralty, promulgated by the Supreme Court of the United States, May 6th, 1872, the *New York Transcript* says: "The amendment, or, more exactly speaking, the new 12th Rule, will startle the great mass of the profession, but those who read our articles on this subject, could not but perceive that the Supreme court would, as foreshadowed by their decisions of late, soon restore the civil and maritime jurisdiction of the United States Court of Admiralty, and give it, as it has by this Rule, exclusive jurisdiction *in rem*, in 'all suits by material men for supplies or repairs, or other necessities,' in all cases of ships, *whether foreign or domestic*. This restores the jurisdiction of our Federal Admiralty tribunals to the status of the Admiralty, as administered in the maritime courts of continental Europe at the time of the adoption of our Federal Constitution. In our article of

the 29th April, 1872, in Judge Benedict's Pilot case, we then thought that the restoration of the *old* 12th Rule would answer all purposes. The Supreme Court, however, on this question before it, said, that that would be a recognition of the assumption of the State Statutes, which, although not in name, yet really, created proceedings and tribunals, to adjudicate cases 'civil and maritime,' which the Constitution has reserved for the exclusive jurisdiction of the Federal Courts. The Rule, as it now stands, is most perfect, and is all that our marine artizans and material men can desire."

JUSTICE MCKEAN.

The Supreme Court of the United States has robbed Chief Justice McKean of all the cheap notoriety he obtained by reason of his onslaught upon the Mormons and their institutions. The opinion in the case appealed to that court was read by Chief Justice Chase, on Monday last, and contained an extended review of the history of legislation relative to territories, from the foundation of the government. The court held, first, that while powers are granted to territories by organic acts passed by Congress, that body has no right to pass any class of laws relating to the territories which it has not a right to pass for the government of the States; second, that the duties of the district attorney and the United States marshal in the territories are precisely the same as they are in the States; and, third, that the juries which have been drawn in Judge McKean's court during the past year, both grand and petit, have been illegal. The effect of this decision will be to render void all criminal proceedings in the territory since Judge McKean's accession; to discharge some one hundred and forty prisoners, who have been illegally held at an expense of nearly \$50,000; to invalidate much of the civil business done during the year, and to give a new Chief Justice to the Supreme Court of Utah.—*Albany Law Journal*.

LOSSES BY THE CHICAGO FIRE.

In summing up the results of this great fire, Hon. Alex. Delmar, late director of

the Bureau of Statistics of the United States, presents the following brief exhibit: "From eighteen to twenty thousand buildings were destroyed, including some fifteen hundred substantial business structures, together with all their valuable contents, their vast stores of machinery, merchandise, clothing, furniture, plate, books and works of art. Of grain, no less than 1,600,000 bushels were devoured by the flames; of lumber, 50,000,000 feet were burnt; of coal, 80,000 tons; and, roughly speaking, a month's supply of flour, provisions, groceries, and dry goods and articles of wear for a third of a million of people. The district laid waste measures from 2,300 to 2,500 acres; the values destroyed are variously estimated at between \$150,000,000 and \$300,000,000. * * * Of the two or three hundred millions of values destroyed, about ninety millions were covered by insurance. * * * What proportion will be paid of the total ninety millions, cannot as yet be definitely ascertained; but in all probability not much over one-third, at the outside, one-half; and most of this from the States of New York, Connecticut, Massachusetts and Pennsylvania."—*Mass. Ins. Report*.

ITEMS.

A MEMORIAL, urging a copyright treaty with the United States, was presented to Lord Granville on the 4th of May. The memorial was signed by Carlyle, Froude, Stuart Mill, Huxley, Morley, Ruskin and others; and Lord Granville replied that her Majesty's government would carefully consider the matter. An international copyright law is a *desideratum*, and the English authors are not to be censured for their protest against the way they are treated, financially, in the United States. The American people do them the honor of reading their works to an enormous extent, and the American publishers us-

ually do them the injustice, so to speak, of printing their works without compensating them. Both home and foreign authors justly complain of the present condition of the book relations between America and Europe.—*Albany Law Journal*.

CHAS. A. TUTTLE, Esq., of the San Francisco Bar, has been appointed reporter of the Supreme Court of California.

GEORGE W. MILLER, Insurance Commissioner of New York, has resigned.

MR. WM. F. CHURCH has been appointed Commissioner of the new Insurance Department of Ohio. Mr. Church is familiar with fire insurance, and has had considerable experience as a fire adjuster.

THEOPHILUS PARSONS, when Chief Justice of Massachusetts, once stopped Mr. Dexter in an argument, on the ground that he was trying to persuade the jury of that for which there was no evidence.—Dexter angrily replied: "Your Honor did not argue your own cases in the way you require us to." "Certainly not," was the reply, "but that was the judge's fault, not mine."

THE Legislature of Mississippi has incorporated a co-operative insurance company, the "Co-operative Life Association of Mississippi."

THE Mississippi Valley Life Insurance Company, of Louisville, has re-insured in the St. Louis Mutual Life.

MR. BISHOP, in his "First Book of the Law," speaking of the natural qualifications necessary for the study and practice of the law, says: "A man with a contracted moral part may sometimes make a good physician, or even a good minister of the gospel; but he can never become a good lawyer."

CURRENT TOPICS.

—It is said that several officers of New York insurance companies *'ran away* about the time their testimony was wanted in the Miller Investigation.

Hon. Wm. Barnes, of New York, her received from the President an appointment as one of the three Commissioners from the United States to the Statistical Congress at St. Petersburg.

—The Homœopathic Mutual Life Insurance Co. has increased its capital stock by the addition of \$50,000.

—In the case of Slaughter against the Phoenix Ins. Co., Judge Davis, of the United States Supreme Court, justly condemns the small type in which the conditions of policies are printed.

PROTECTION LIFE OF CHICAGO.—Mr. A. F. Harvey, Actuary of the Missouri Insurance Department, recently visited Chicago to make an examination of this company preparatory to its doing business in Missouri. During the course of the examination, that gentleman's questions proved a little too close for President Skinner, whereupon he not only refused to answer further, but managed, during Mr. Harvey's temporary absence from the room, to get hold of his papers containing the statements he had already made, which he refused to return.—The Protection does not do business in Missouri.

—The Attorney General of New York has instituted legal proceedings against George W. Miller, late Superintendent of the Insurance Department, to compel him to pay into the State Treasury the fee of one-fifth of one per cent. paid by insurance companies on the transfer of securities, and retained by him.

—The St. Joseph Fire and Marine Insurance Company, of Missouri, has recently increased its capital to \$200,000. It will soon apply for admission to the State of New York.

—The Liverpool and London and Globe Insurance Company, inspired by the success which has recently attended the efforts of some of the local companies in the same direction, has brought suit

against the city of New Orleans for \$8,282 75, the same being the amount of license taxes claimed to have been unconstitutionally levied and collected of it from the year 1865 to 1871 inclusive.

—John W. Godfrey, Esq., has resigned the agency of the Charter Oak Life Ins. Co., of Hartford, which he has held in St. Louis since 1856. Mr. Godfrey is one of the most respected and successful insurance men west of the Mississippi, and had represented several of the best insurance companies in the country—both fire and life—before his connection with the Charter Oak. His resignation was caused by ill-health, resulting from too close application to business. It is the hope of his many friends that a few months recreation in the mountains of Colorado, will restore him to health and usefulness.

NATIONAL LIFE OF CHICAGO.—This company has been the object not only of the criticism, which is always to be expected by those professing to be reformers, but of the abuse which is always heaped upon those whose success interferes with powerful and established interests. The official and managing board of the company comprises some of the most honorable and reliable business men of Chicago. President Lombard and his associates seem determined to give a thorough and honest trial to the principles they have adopted, and for their endeavors in this direction they deserve credit.

—Ira J. Mason, Esq., of Chicago, has entered into a co-partnership, in that city, with Wm. H. Wells, in the General Agency of the Charter Oak Life Insurance Company, of Hartford. Mr. Mason was one of the firm of Paul and Mason, General Agents for the Washington Life—one of the most enterprising and efficient agencies in the country. Mr. Mason is one of the best insurance men in the Northwest.

—Gov. Hoffman has appointed William H. Seward, of the Commission of Appeals, Justice of the Supreme Court, in place of Albert Cardozo, resigned.

—The Supreme Court of Arkansas has decided that all orders of courts issued in regard to administrations by the Confederate courts, are void.

AMERICAN INS. CO., OF CHICAGO.—This company was the only home fire insurance company in Chicago, at the time of the great fire, that survived that disaster. Although it had over \$40,000,000 at risk at that time, its loss was less than \$1,000. This was due to the fact that for several years past the company has written no policies on commercial or ordinary risks in cities, but has confined its business exclusively to dwelling houses, farm property, private barns and their contents, churches and school houses. These facts, more clearly set forth in the Thirteenth Annual Statement, made January 1st, 1872, and given on another page, demonstrate the advantages offered by this company to farmers and those owning the class of property upon which it writes policies.

—Messrs. Williams & Block have accepted the general agency of the Charter Oak Life, for Missouri, rendered vacant by the resignation of Mr. Godfrey. Mr. Block is a young man of ability and character, and has been connected with the St. Louis office of the company for several years. Mr. Williams has represented the company successfully in the western part of that State.

—The *Albany Law Journal*, speaking of the resignation of Judge Cardozo, as Justice of the Supreme Court, says, "By this act the State is relieved of a judge, who, whether or not guilty of the grave charges made against him, had so entirely lost the confidence and respect of the public as to destroy his usefulness and to bring the administration of Justice into disrepute. The Assembly has decided not to take further action on the impeachment, the object and moral effect of impeachment having been attained."

—The Republic of Switzerland has been agitating the question of the abolition of capital punishment; and it has been finally brought before the people in the form of an amendment to the Constitution of the State. The amendment was voted on and rejected. Two other amendments—one abolishing imprisonment for debt, and another excluding the Jesuits from Swiss

territory—failed also to receive the requisite popular approval.

—The *LaCrosse Democrat*, is responsible for the following: "Now that about 300,000,000,000 bushels of charm bells, made out of the Chicago court house bell, have been sold, and whereas the grain elevators of Chicago are full of little bells instead of grain for throwing upon the market when spring opens, and whereas the market is now packed, and it has been deemed advisable by the people of Chicago to start a new sensation. A company has been formed to manufacture court house bells out of the material of the bell lately worn by Mrs. O'Leary's cow. The bell has been secured and is now on exhibition at a saloon in Chicago; and it is believed, if the bell is properly utilized, there is enough in it to make a bell for every court house in America, and have the original bell left for Mrs. O'Leary. The Mayor of Chicago will furnish a certificate that every bell furnished is genuine, and will, in fact show the cow from which it was taken."

THE ANCHOR Fire & Marine Insurance Company, of St. Louis, has re-insured its risks, and retired from business.

—We learn from the *Chicago Legal News*, that arrangements have been made for a Law Department in the Northwestern University, at Evanston, Ill.

—The death of six railroad conductors during the first week in May, caused the Railroad Conductors' Life Insurance Company to disburse \$19,200.

—*Doolubdass Pettamberdass vs. Raimbollah Thackoorseydass*, are the names of the "asses" that went to law, as reported 7 Moore, P. C. 279. This neat little citation will be found in 8 Gray, 175.—*Albany Law Journal*.

—"Are the jury agreed?" "Yis," says Pat., "to send for another half gallon."

—Man is the only animal that chews tobacco, and makes love at all seasons of the year.

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No. 10

DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

CONSTRUCTION.

§ 179. FIRE.—*Immediate Notice.*—The policy provides that “in case of loss the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire.” *Held*, that “It may be considered, perhaps, questionable, whether the word ‘immediate’ applies to or qualifies anything but the notice, or extends to any of the subsequent conditions or acts which the assured is required to perform. We are inclined to think it does not so extend, but is limited in its application to the notice, which not being required to be in writing, immediate verbal notice satisfies the condition.”

*O'Connor vs. Hartford Fire Ins. Co.**

Rep'd Jour'l p. 731.

Wis. S. C.

INSURABLE INTEREST.

§ 180. MARINE.—*Of Consignees.*—The plaintiffs consigned

* Decision rendered May 18th, 1872. To appear in 26 Wis.

five barges of ice, of which they were owners, to consignees, to be sold on commission, and ordered them to have the ice insured. The consignees took the insurance in their own names. One of the barges was lost by a peril insured against, and the consignees assigned the policy to the plaintiffs, and suit was brought by them for the value of the cargo. *Held*, that if a consignee accepts a consignment with instructions from his principals to insure for their benefit, it becomes his duty to insure, and if he neglects to do so, and a loss occurs, he is liable to them for the amount of the loss; and *Held*, that the consignees in this case had a right, instead of taking out a new policy, in the names of their principals, to have the risk entered on their own policy, in their own names, as a convenient mode of indemnifying themselves against such damages as they might suffer in not insuring in the names of their principals. They had a right thus to protect themselves, and to this end they ought to be considered as interested to the full value of the ice.

See *Bartlet et. al. vs. Walker*, 13 Mass., 267; *Oliver vs. Green*, 3 Mass., 133; *Herkimer vs. Rice*, 27 N. Y., 163.

*Shaw et al. vs. Aetna Ins. Co.**

Rep'd Jour'l p. 745.

Mo. S. C.

INTEMPERANCE.

§ 181. LIFE.—*Policy—New Trial*.—A clause in the policy provided that if the party, whose life is insured shall die "by reason of intemperance from the use of intoxicating liquors," the policy shall be void and of no effect. As a defense to the action, the defendant pleaded that the insured did die by reason of intemperance from the use of intoxicating liquors, and that the policy was void. *Held*, that giving to the evidence the weight and effect most favorable to the plaintiff, the insured "died of congestion or from exposure, both of which were the direct consequence of his intemperate use of intoxicating liquors," and that "this conclusion sustains the defense that he died from intemperance." On the above point there was no conflicting testimony, and the defendant, in the court below, moved for a new

* Decision rendered April 1st, 1872. To appear in 49 Mo.

trial, on the ground that the verdict was contrary to the evidence. *Held*, also, that the court erred in overruling the defendant's motion.

*Miller vs. The Mutual Benefit Life Ins. Co.**

Rep'd Jour'l p. 747.

IOWA S. C.

§ 182. **LIFE.**—*Policy—Burden of Proof.*—A clause in the policy provided that if the party, whose life is assured, shall die "by reason of intemperance from the use of intoxicating liquors," the instrument shall be void and of no effect. As a defense to the action, the defendant pleaded that Miller, the insured, did die by reason of intemperance from the use of intoxicating liquors, and that the policy was void. *Held*, that the jury were correctly instructed by the court "that the burden of the proof upon this defense rested upon the defendant, and that it was not necessary for them to be satisfied beyond a doubt of the fact of Miller's death from intemperance, but a preponderance of proof to that effect would authorize them to find for the defendant."

Miller vs. The Mutual Benefit Life Ins. Co.

—§ 181.

JURORS.

§ 183. **FIRE.**—*Competency of.*—One of the jurors, on challenge, said he had some prejudice in his mind against insurance companies generally, and that his prejudice was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict. *Held*, that, it is the duty of this court to revise the action of the court below in all cases as to the competency of jurors. It was error in the court below to overrule the challenge.

Winnesheik Ins. Co. vs. Schueller.†

Rep'd Jour'l p. 761.

ILL. S. C.

JURY.

§ 184. **FIRE.**—*Questions for—Waiver of Proofs of Loss.*—

* Decision rendered June 10th, 1872. To appear in 35 Iowa.

† Decision rendered Jan. 22d, 1872. To appear in 55 Ill.

The court below instructed the jury that certain facts, if proved, were a waiver of further proofs of loss. *Held*, that, "the jury find the facts, and the court determines the law. Whether certain facts have been proved or not, must be ascertained by the jury. Whether or not they amount to a waiver, when proved, the court must decide." The instruction was properly given.

Winneshiek Ins. Co. vs. Schueller.

—§ 183.

OWNERSHIP OF PROPERTY.

§ 185. FIRE.—*Evidence*.—The evidence showed that the property destroyed was the same as that mentioned in the policy; that the insured was in actual possession at the time of the loss, and had been for seven years prior thereto, and that she held the property by virtue of a deed introduced in evidence. Appellant asked no instruction as to the insufficiency of the evidence. *Held*, that "the actual possession, accompanied with claim of the fee, raises the presumption of an estate in fee."

Mason vs. Park, 3 Seam., 532; Brooks vs. Bruyn, 18 Ill., 529.

And that the silence of appellant dispensed with the production of higher and better evidence.

Clay et al. vs. Boyer, 5 Gil. 506, 18 Ill., 529.

Winneshiek Ins. Co. vs. Schueller.

—§ 183.

§ 186. FIRE.—*Evidence — Construction — "Owner"*.—The declaration contained an averment that the assured was the owner of the property insured, and on the trial a deed, conveying the property to her, was introduced in evidence, and read to the jury, the court overruling an objection to its introduction. *Held*, that the averment in the declaration was equivalent to an averment of an estate in fee, and that the objection to the introduction of the deed in evidence was properly overruled. "It was some evidence of title, and the appellee was under no obligation, prior to its introduction, to produce the deed to her grantor."

Winneshiek Ins. Co. vs. Schueller.

—§ 183.

PAYMENT OF LOSS.

§ 187. FIRE.—*Personal Examination—Proofs of Loss.*—By the terms of the policy the amount of the loss or damage was not payable for ninety days after due notice and proofs of loss. The policy provided that the proofs of loss should be delivered within thirty days, and that the assured should, if required, submit to a personal examination. The insured delivered the proofs of loss to the secretary of the company within the thirty days, and the examination was made after the expiration of the thirty days. *Held*, that the examination was no part of the proofs of loss, and that the time of payment is to be reckoned from the delivery of the proofs of loss, and not from the examination.

Winnesheik Ins. Co. vs. Schueller.

—§ 183.

POLICY.

§ 188. FIRE.—*Waiver of Written Condition by Agent—Gunpowder.*—A clause in the policy provided that the policy should be void if gunpowder was kept in the house without written permission, and that nothing less than a distinct agreement indorsed on the policy should be construed as a waiver of any condition or restriction. The insured at the time of the loss, had on hand a few pounds of gunpowder, kept with the knowledge and express permission of the company's agent. *Held*, that "the company was chargeable with the act of the agent in giving permission to keep the powder, and as the provision for forfeiture was made solely for the benefit of the company, it must be regarded as having waived it, upon the principle that what is exclusively for its benefit, it can enjoy or not as it pleases. Some of the interdicted articles are gunpowder, saltpetre, nitrate of soda, petroleum, benzine, gasoline, spirit of gas, or any burning fluid. Such conditions, printed, as they usually are, in the smallest type, and read with great difficulty, are but traps when the attention is not called to them. There is scarcely a housekeeper in the State who does not keep on

hand some one or more of the prohibited articles. With knowledge of the fact on the part of agents, and when no notice is given of the stringent character of the condition, but specific authority is granted to continue to keep the articles, the company waives the forfeiture."

Atlantic Ins. Co. vs. Wright, 22 Ill., 462; N. E. F. & M. Ins. Co. vs. Schettler, 38 Ill., 166; Com. Ins. Co. vs. Spankneble, 52 Ill., 53; Phoenix Ins. Co. vs. Slaughter, 12 Wall., 401.

*Reaper City Ins. Co. vs. Jones.**

Rep'd Jour'l p. 759.

ILL. S. C.

§ 189. FIRE.—*Avoidance of—Limitation—War.*—The policy provided that "no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim." Suit was brought upon the policy after the expiration of more than twelve months from the time of the loss. The plaintiff claimed that the late civil war prevented the bringing of the suit within the twelve months provided in the policy. *Held*, that "the period of twelve months, which the contract allowed the plaintiff for bringing his suit, does not open and expand itself, so as to receive within it three or four years of legal disability, created by the war, and then close together at the end of that period, so as to complete itself, as though the war never occurred," and that "if the plaintiff shows any reason, which in law rebuts the presumption, which on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully, nothing but a presumption of law or a presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumption of law." *Held*, also, that "the disability to sue, imposed on plaintiff by the war, relieves him from the consequences of failing to bring suit within twelve months after the loss, because

* Decision rendered June 24th, 1872. To appear in 56 Ill.

it renders a compliance with the condition impossible, and removes the presumption, which the contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to plaintiff's right to recover."

*Semmes, Adm'r, vs. City Fire Ins. Co.**

Rep'd Jour'l p. 663.

U. S. S. C.

§ 190. *LIFE*.—*Mistake in — Parol Evidence — Equity.*—Sartorius, the agent of the plaintiffs, doing business both by publication and sign, stated to the agent of the company, at the time of taking out a former policy, in another company, of which he was also agent, that he was doing business as agent of the appellees, and the policy was issued to him as such agent. Afterwards, he requested the same agent to make out another policy, in this company, as the first was made out, and took it for granted the agent had done so. By accident or mistake, the agent omitted or neglected to insert in said policy that said Sartorius was insured as agent. *Held*, that "a court of equity has authority to reform a contract, where there has been an omission of a material word or stipulation by mistake, and a policy of insurance is within the principle. But a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence."

1 Phillips on Ins. 72, and 2 Phillips on Ins., 560; Phoenix Fire Ins. Co., vs. Gunce, 1 Paige, 278.

And that "a court of equity will grant relief in cases of mistake in written agreements, not only when the fact of the mistake is expressly established, but is fairly implied from the nature of the transaction."

1 Story's Eq. Jur., 161, § 162, and Wyche vs. Green, 11 Ga. 171, 172.

Held, also, that "parol evidence is admissible to prove the mistake, though it is denied in the answer, and this, either when the plaintiff seeks relief affirmatively, on the ground of mistake, or when the defendant sets it up as a defense, or to rebut an equity."

* Decision rendered Dec. 18th, 1871.

Gillespie vs. Moon, 2 John, Ch. 585; Willman vs. Wright, 9 Ind. 126; and Davidson vs. Green, 3 Sneed, 384; Lambert vs. Hill, 41 Me., 475, and Adams vs. Stevens, 49 Me., 366.

Held, also, that the confidence reposed in the agent of the company was a reasonable confidence, and that it was competent for the court below to correct and reform the policy issued on the agent's own account, in such a manner as to cover the interests of the appellees, and to render judgment for the appellees, upon the policy as reformed.

*The Phoenix Ins. Co. vs. Hoffheimer Bros. & Co.**

Rep'd Jour'l p. 651.

MISS. S. C.

PRACTICE.

§ 191. FIRE.—*New Trial on Error*.—The court below erred in overruling the challenge of a juror. *Held*, that, this court will not grant a new trial or reverse a judgment on error for misdirection of the court below, if it appears from the entire record that justice has been done, and that the errors complained of could not have affected the merits of the case or influenced the action of the jury.

Winneshiek Ins. Co. vs. Schueller.

—§ 183.

PROOFS OF LOSS.

§ 192. FIRE.—*Objections to*.—The policy provided that "in case of loss the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire." The fire occurred April 8th, and the proofs of loss were made on the 13th of August following. The company refused to pay, claiming that the proofs of loss were not made within proper time. *Held*, that it is "a general principle, applicable to all cases of this nature, that where the company declines to receive the proofs of loss and to pay it upon the ground of insufficiency or informality in such proofs, or because made out of time, as was done in this instance, it shall, in its communica-

* Decision rendered April, 1872. To appear in 45 Miss.

tion to the assured, state the grounds of such refusal on its part, as the same are then known or believed to exist by the officers or agents having charge of the business."

Killips vs. Putnam Fire Ins. Co., Wis. S. C., 1 Ins. Law Jour'l, 169.

O'Connor vs. Hartford Fire Ins. Co.

—§ 179.

§ 193. FIRE.—*Waiver in—Personal Examination of Insured.*—The policy required that the assured should make out a written account of the loss, within thirty days thereafter, and deliver it at the office of the company, and, if required, submit to an examination, under oath, by an officer of the company, or any person appointed by the company. "When the secretary was first notified of the loss, he gave the appellee a blank, on which to make her proofs of loss. This was filled up and returned to him. He examined it, and made no objection to it, except that a few articles were not covered by the policy, and erased them. He retained the paper, and did not require any further proof, or the performance of any other act. During the thirty days appellee visited the office of the company on different occasions, after she had delivered her proof of loss, and no additional requirement was made, and no objection preferred." The account of the loss thus delivered was not formally correct, and some of the requirements in the condition of the policy were omitted. *Held*, that the personal examination provided for by the policy, and made by the officers of the company, after the expiration of the thirty days from the fire, constituted no part of the proof required on the part of the insured. If the corporation desired this personal examination in aid or as explanatory of the proofs submitted by the assured, it should have insisted upon it within the thirty days. *Held*, also, that the company had waived any omissions or irregularities in the proof of loss delivered. "Good faith required that the company should apprise the assured of any objections entertained, before she lost her right to supply defects and omissions."

Peoria Marine & Fire Ins. Co. vs. Lewis, 18 Ill., 553; Great Western Ins.

Co. vs. Staaden, 26 Ill., 361; Turley vs. The N. Am. Ins. Co., 25 Wend., 374; Ætna Ins. Co. vs. Tyler, 16 Wend., 385.

Winneshiek Ins. Co. vs. Schueller.

—§ 183.

WIFE.

§ 194. FIRE.—*Agency of—Evidence.*—The husband, at the time of the fire, was permanently absent, and totally ignorant of the loss of the property, and of all the circumstances attending it, as also of the kind, value and quantity of property destroyed. *Held*, that the wife, without express directions or delegation of power from her husband, had authority to make proofs of loss, and to do other necessary acts required of the assured, and was competent as a witness to testify to such facts alone within her knowledge. *Held*, also, that she could only testify as to those facts which came within the scope of her authority as agent of her husband during his absence, and that she was not competent to testify in regard to his ownership of the land upon which the insured property was situated.

Birdsall vs. Dame, 16 Wis., 235; Hobby vs. Wisconsin Bank, 17 Wis., 167; Schaeffer vs. the State, 3 Wis., 823; Farrel vs. Hedwell, 21 Wis., 182; Butts vs. Newton, *supra*, unreported; Barnes vs. Martin, 15 Wis., 240; Hays vs. Hays, 19 Wis., 182; Crook vs. Heany, 25 Wis., 569; The State vs. Dudley, 7 Wis., 664.

Held, also, that where the wife is authorized to act as agent for her husband, and her authority is not in writing, such authority may be proved by herself.

O'Conner vs. Hartford Fire Ins. Co.

—§ 179.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

SUPREME COURT OF WISCONSIN.

F. O'CONNOR, *Resp't*,

vs.

THE HARTFORD FIRE INS. CO., *App't*.* }

Where the policy provided that "in case of loss the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire," the word "immediate" does not apply to or qualify anything but the notice, which not being required to be in writing, immediate verbal notice satisfies the condition.

It is a general principle that where the company declines to receive the proofs of loss and to pay, upon the grounds of any insufficiency or informality in such proofs, or because made out of time, it shall state to the assured the grounds of such refusal on its part, as the same are then known or believed to exist by the officers or agents having charge of the business.

It is well settled in this State, that the wife, having acted as agent of her husband, is a competent witness for him, to prove any act done by her, or fact transpiring within the scope of such agency; and her authority as such agent, when not in writing, may be proved by herself.

Where the husband was permanently absent and totally ignorant of the loss and of all the circumstances attending it, as also of the kind, value and quantity of property destroyed, the wife had authority to make proofs and do other necessary acts required of the assured, and was competent as a witness to testify to facts alone within her knowledge, and that without express directions or delegation of power from her husband.

The wife could only testify to those facts which came within the scope of her authority as agent of her husband during his absence, and was not competent to testify in regard to her husband's ownership of the land upon which the insured property was situated.

* Decision rendered May 18th, 1872.

DIXON, C. J.

It is objected that the proofs [of] loss furnished to the company were not made within proper time. The fire occurred April 8th, and the proofs of loss were made [and] sworn to the 13th of August after. The requirement of the policy is that, "in case of loss, the insured shall give immediate notice thereof," and then immediately follows the words, "and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire," &c., &c. It may be considered, perhaps, questionable whether this word "immediate," applies to or qualifies anything but the notice, or extends to any of the subsequent conditions or acts which the assured is required to perform. We are inclined to think it does not so extend, but is limited in its application to the notice, which not being required to be in writing, immediate verbal notice satisfies the condition. In the present case it appears that immediate notice of the loss was given to the local agent of the company.

But if we are wrong in the above conclusion, there are other facts disclosed, which in our judgment show a waiver of the objection on the part of the company. This court is prepared to affirm as a general principle, applicable to all cases of this nature, that where the company declines to receive the proofs of loss, and to pay it upon the ground of any insufficiency or informality in such proofs, or because made out of time, as was done in this instance, it shall in its communication to the assured, state the grounds of such refusal on its part, as the same are then known or believed to exist by the officers or agents having charge of the business. This conclusion as to the legal duty under such circumstances, of the officers and agents of such companies, was strongly intimated in the case of *Killips vs. Putnam Fire Ins. Co.*, Wis., S. C., 1 Ins. Law Jour'l, 169. The remark was called out there by what was considered the unfair and disingenuous conduct of an agent of the company. Nothing of the kind can be attributed to any agent here, but as the relation between assured and insurer is to a great extent one of trust and confidence, requiring the utmost good faith and candor on both sides, we cannot think that the law will permit, much less encourage, the company in objecting to the form of the proofs, without at the same time informing the assured what the objections are. In this instance, we are glad to say, that the obligations of the law, and the obligations of private or individual courtesy, and of the civilities of ordinary business intercourse, as recognized among well-bred people, exactly coincide. The

company requires the assured to make the fullest disclosure, and submit to the most rigid examination on his part, which is all very proper, and why should not the company in turn notify him of the objections it takes to the form and sufficiency of his proofs, and of its reasons for refusing payment? It is the opinion of this court that it should.

It is objected that it was incompetent for the wife of the plaintiff to testify to the facts showing her agency for her husband in the transactions connected with the insurance or the proof of the loss. It is well settled in this State, that the wife, having acted as agent of her husband, is a competent witness for him, to prove any act done by her, or fact transpiring within the scope of such agency. It is a well settled principle, generally, as appears from the citations by counsel for the plaintiff, that the authority of an agent, when not in writing, or required to be, may be proved by the agent himself. This principle, which governs in the proof of all other agencies, cannot be denied operation in the single case where the wife acts as the agent of the husband, or the husband as the agent of the wife. No reason is assigned for the discrimination, and it is believed none in fact exists.

In the present case the plaintiff and husband was absent from home at the time the house took fire, and with its contents was consumed. He was not absent temporarily, but had been gone over fourteen months when the burning took place, and was still absent when the cause was tried in the court below, nearly three years after his departure.

In *Meek vs. Pierce*, 19 Wis., 300, this court held that the wife left in charge of the house and premises of the husband during his temporary absence from home, did not become his agent in such a sense that she could bind him by her consent to have the premises searched for stolen property; nor were the circumstances such as to make her a competent witness in his behalf in an action of trespass by him against the persons making the search, to show that such consent was not given.

In a late case it was also held that the wife of a husband who had absconded, did not thereby become his agent, with general authority to sell or dispose of his personal property. *Butts vs. Newtown*, ante, (unreported). But in a case like the present, with the husband permanently absent, and totally ignorant of the loss or destruction of the property, and of all the circumstances attending it, as also of the kind, value and quantity of property destroyed, it would seem that the authority of the wife to make the proofs and do other necessary acts required of the assured, and her competency as a witness to testify to

facts alone within her knowledge, would at once *ex necessitate* arise. Such, in the judgment of this court, were the authority and competency of the wife here in the absence of any express directions or delegation of power from her husband to her. But there was evidence of such express power. She testified that he told her "to care for the place and property until he returned;" "to take care of it the same as himself until he returned."

The objection, based on a strict and literal construction of the language of the policy, that no one but "the assured" can give the notice, and that the proofs must be verified by his oath, and cannot, under any circumstances, be verified by the oath of another, is too refined and unreasonable to merit serious consideration. It is proper, however, to observe that counsel do not urge it, though it seems to have been looked upon as important by some of the agents of the company.

The exception to the ruling of the court excluding the evidence offered by the company for the purpose of showing that the plaintiff, who was represented in the application and policy as the owner of the land on which the house stood, was not such owner, but held only an executory contract for the purchase of it, resolves itself into a question of the competency of the wife of plaintiff to give testimony upon that subject. The company recalled the wife as a witness in its behalf, and the offer was to prove by her testimony that the husband held only a contract for the purchase of the lot. The court excluded the testimony upon the ground that the wife could only testify as to those facts which came within the scope of her authority as agent of her husband during his absence, and that this was not such a fact. The court observed the distinction which the decisions clearly maintain as to the extent of the wife's competency as a witness for or against her husband in actions to which he is a party, and the ruling was obviously correct. *Birdsall vs. Dame*, 16 Wis., 235; *Hobby vs. Wisconsin Bank*, 17 Wis., 167; *Schœffler vs. The State*, 3 Wis., 823; *Farrel vs. Hedwell*, 21 Wis., 182; *Butts vs. Newton*, *supra*; *Barnes vs. Martin*, 15 Wis., 240; *Hays vs. Hays*, 19 Wis., 182; *Crook vs. Heany*, 25 Wis., 569; *The State vs. Dudley*, 7 Wis. 664. The wife in this case was competent, and might be examined as a witness as to all facts transpiring within the scope of her agency, and whilst she was acting as the representative of her husband, but she was not a general witness in the cause. The inquiry concerning her husband's title or want of title to the lot at the time he obtained the insurance, was not an inquiry into any fact or act transpiring in the course of her

agency, or with which she was connected in the capacity of agent. It was a general fact, disconnected with her representative character, and of which she was incompetent to speak as a witness. The company, if desirous of establishing the fact, if it were a fact, should have offered to prove it by some competent witness, or other admissible evidence.

It appears from the whole record, therefore, that there was no error for which the verdict or judgment should be disturbed, and that the judgment must be affirmed.

It is so ordered.

UNITED STATES CIRCUIT COURT,

DISTRICT OF MASSACHUSETTS.

CHESTER I. REED, *et al.*, *Petitioners*,

In the Matter of the

INDEPENDENT INSURANCE CO. }

Congress is as competent to apply laws on the subject of bankruptcy to private corporations created by the States as to natural persons or private corporations created by authority of Congress.

State laws on the subject of bankruptcy and insolvency must yield to the law of Congress on the same subject, when the State law applies to the same subject matter; and when it differs in material respects from the law of Congress, the State law is suspended, while the law of Congress remains in force.

The Independent Insurance Company, of Boston, is a corporation created by the laws of Massachusetts, to transact the "business" of insurance. It is clearly included in the class of "business or commercial corporations" to which the provisions of the bankrupt act apply.

After the passage of the bankrupt act the company became insolvent and committed acts of bankruptcy. After this time, the operation of any State law regulating the assignment and distribution of the property of the insolvent debtor corporation, and affecting the same persons, property and rights that would be affected by proceedings under the bankrupt act, was suspended.

By a final decree of the State Supreme Court, in a suit instituted by the Insurance Commissioner, in behalf of the State, the injunction previously issued was made perpetual; the petitioners were appointed receivers, and in the language of the court it was "further adjudged and decreed that said corporation be, and the same is hereby dissolved." The company was insolvent and had committed acts of bankruptcy, by fraudulent preferences. Creditors filed their petition in the United States District Court for adjudication of bankruptcy against the company, and subsequent to the decree of the State court the company was adjudged bankrupt, and a warrant of bankruptcy was issued.

The statutes of the State under which these proceedings were instituted by the In-

* Decision rendered 1872.

insurance Commissioner do not contemplate or authorize any such decree as would annul the existence of the corporation, and no such decree was sought in the petition or made by the court.

By a fair construction of language, it was the intention of the court only so far to dissolve the corporation, as in the language of the statutes under which they were acting, might "be needed to suspend, restrain or prohibit" the further continuance of the "business" of the company. The corporation still exists for the purpose of being proceeded with in bankruptcy.

It is not necessary to determine to what extent the receivers have the authority to represent the corporation.

They have no power to withhold the assets of the company and to liquidate its liabilities and affairs according to the mode provided by the State laws for the liquidation of insolvent corporations.

SHEPLEY, J.

The constitution of the United States confers upon congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Unquestionably, congress is as competent to apply such laws to private corporations created by the States as to natural persons, or private corporations created by authority of congress; *Sweet vs. B., II. and Erie R. R., 5 B. R., 240.* Congress has exercised the power thus conferred upon it by the constitution, by the enactment of the bankrupt act, and "the provisions of this act apply to moneyed, business or commercial corporations." Having thus exercised this power by the enactment of the bankrupt act, and the constitution further providing that the laws of the United States, which shall be made in pursuance of the constitution, shall be the supreme law of the land, the inference is irresistible that State laws on the subject of bankruptcy and insolvency must yield to the law of congress on the same subject, when the State law applies to the same subject-matter; and when it differs in material respects from the law of congress, it appears clear that the State law is suspended, while the law of congress remains in force. *Ex parte Eames, 2 Story, 323; Sturgess vs. Crowningshield, 4 Wheaton, 122-196; Ogden vs. Saunders, 12 Wheaton, 213; May et al. vs. Buel et al., 7 Cushing, 40; Griswold vs. Pratt, 9 Metcalf, 23; Thornhill et al. vs. Bank of Louisiana, 5 B. R., 372.* The Independent Insurance Company, of Boston, is a corporation created by the laws of Massachusetts, to transact the "business" of insurance. It is clearly included in the class of "business or commercial corporations" to which the provisions of the bankrupt act apply. After the passage of the bankrupt act, it became insolvent, and committed such acts of bankruptcy as clearly constituted it "one of those" corporations whose pecuniary condition brings them within the provisions of the act, entitled to the benefits which the act confers, and subject to all its obligations and requirements. *Sweet vs. the B., II. and Erie R. R., before cited.* After this time, the operation of any State law, regulating the assignment and distribution of

the property of the insolvent debtor corporation, and affecting the same persons, property and rights that would be affected by proceedings under the bankrupt act, was suspended. It was not the intention of the framers of the constitution, or of congress, when it enacted the bankrupt act, to have in existence two distinct and diverse systems affecting the same persons, property and rights, leaving it to the option of the debtor to elect one or the other at his pleasure. In the language of the Supreme Court of Massachusetts, in *Cushing vs. Arnold et al.*, 9 Metcalf, 23, "When the power is exercised by congress, and a bankrupt law is in force, it does suspend all State insolvent laws applicable to like cases, and this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result." On the 9th day of January, 1872, the firm of Joseph Nickerson & Co., filed their petition for adjudication of bankruptcy against the Independent Insurance Company. The petition sets forth, *inter alia*, the insolvency of the company, and alleges that the company committed acts of bankruptcy by fraudulent preferences, on the 14th day of October, 1871, to Edward Atkinson and to Henry Atkins & Co., who were creditors of the company, and whose claims had long been overdue when the payment was made. Upon filing proofs sustaining the allegations in the petition, an order was issued by the district court to the insurance company to show cause why the prayer of the petition should not be granted. On the return day of this order, Chester I. Reed and George Ripley filed a plea to the jurisdiction of the court, setting out that, on the 9th day of January, 1872, they were, by a decree of the Supreme Judicial Court of Massachusetts, rendered in a suit instituted on the 2d day of December, 1871, by the Insurance Commissioner in behalf of the Commonwealth of Massachusetts against said insurance company, appointed receivers of said company, and had accepted the trust and duly entered upon the performance of their duties. The plea further avers that, by the decree aforesaid of the Supreme Judicial Court of the Commonwealth of Massachusetts, the Independent Insurance Company, which was a corporation created and existing under and by virtue of a statute of said Commonwealth, was dissolved, and an injunction which had previously issued in said suit against any further prosecution of its business by said insurance company, was made perpetual. The record of the proceedings in the supreme court, and of the decree, is annexed to the plea, and makes a part thereof. The decree of the district court then proceeds as follows: "And it appears that no denial of bankruptcy was made on the re-

turn day of the order to show cause, and that said corporation, by its answer admits the acts of bankruptcy alleged against it. And thereupon, and upon consideration of the proofs in said cause, and the arguments of counsel thereon, it was found that the facts set forth in said petition were true, it is therefore adjudged that the Independent Insurance Company became bankrupt within the true intent and meaning of the act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of said petition, and it is therefore declared and adjudged bankrupt accordingly." A warrant in bankruptcy was accordingly issued. Within the time prescribed by the rules, the receivers filed in this court their petition for a revision and reversal of these orders and decrees of the district court in bankruptcy. The errors assigned by the petition in the judgment, orders and decrees of the district court are: 1st. That because of the proceedings in the Supreme Judicial Court of Massachusetts, pleaded as aforesaid, and verified by the record aforesaid, and which record was not in any respect controverted, and because of the statutes of said Commonwealth in relation to insurance corporations, the said district court had not jurisdiction to make said orders, adjudications and decrees. 2d. Because of said proceeding of said supreme court and said statutes, and upon the pleading and proofs aforesaid, said corporation had no right to appear in said court, except by said Reed and Ripley, the petitioners, and could not by any counsel, against the objection of said Reed and Ripley, appear, or admit the truth of any averment, plea or allegation, or matter of fact or law.

The petition then alleges that the decree of said court, basing its adjudication of bankruptcy wholly upon the admissions of said parties claiming to act as president and attorney of said company, was erroneous, and it avers that the corporation was dissolved on the 9th day of January. In support of the petition for the exercise of the revisory power of this court, counsel contend that the corporation was the creation of the State, and existed merely at its pleasure; that it was clearly in the power of the State to dissolve it, that this power had been exercised, that the corporation is defunct, and became so before the adjudication in bankruptcy; that consequently the proceedings abated, there being no provision in the bankrupt Act to the contrary; that the State law does not continue the corporation in being so as to change this result; and that, if the corporation is still living, it can only act through receivers, and therefore the decree of the district court was erroneous. Unquestionably, under ordinary circumstances,

the sovereignty which has called a corporation into being, and which, by the terms of the charter or by the provisions of general law, has reserved the right to do so, may amend the charter or repeal it at will by the legislature, or, acting through its judicial tribunals, it may declare the charter forfeit, or terminate the existence of the corporation. Whether, subsequent to the exercise by congress of its constitutional power to establish a uniform system of bankruptcy, it would be within the power of a State, acting either through its legislature or its judicial tribunals, after an act of bankruptcy had been committed by an insolvent corporation, and all State insolvent laws applicable to such cases were suspended, to annul the existence of the bankrupt corporation, so as to prevent the commencement of process, or abate the proceedings after they had been commenced under the act of Congress, may well be doubted. If this could be done, the operation of the bankrupt law upon insolvent corporations could be defeated, the whole jurisdiction in bankruptcy foreclosed, the general creditors could only reach the assets within the reach of State process, and all extra territorial property would be left in the grasp of attaching creditors, and, so far as the extra territorial assets were concerned, payments in full and preferences to favored creditors would be upheld. It is not necessary to decide this question in this case, and at this time. The most cursory examination of the section of the 58th chapter of the Statutes of Massachusetts, under which these proceedings were initiated by the Insurance Commissioner, will show that it does not contemplate or authorize any such decree as would annul the existence of the corporation. A careful examination of the record will show that no such decree was sought or prayed for in the petition, and the like examination of the decree will as conclusively show that no such decree was made by the court. Chapter 58, section 6 of the General Statutes of Massachusetts, provides as follows:

“If, upon examination, the commissioners are of opinion that a company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public, or to those holding its policies, they shall apply to a justice of the supreme judicial court to issue an injunction restraining such company, in whole or in part, from further proceeding with its business until after a full hearing can be had. Such justice shall forthwith issue the injunction, and after a full hearing of all parties interested, may dissolve or modify the same, or make it perpetual, and he may make such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company: and may appoint agents or receivers to

take possession of the property and effects of the company, subject to such rules and orders as are, from time to time, according to the course of proceedings in equity prescribed by the court or a justice thereof in vacation."

It is clear that this power to suspend, restrain or prohibit the further continuance of the business of the bankrupt corporation, no more authorized the court, in this form of proceeding, to annul the being of the corporation, than a similar statute power to suspend, restrain or prohibit the further continuance of the business of a bankrupt natural person would authorize the court to take the life of the bankrupt. The Insurance Commissioner, in his petition, represented to the court that the corporation was insolvent, and its condition was such as to render its further proceedings hazardous to the public and its policyholders. He prays for a writ of injunction commanding the corporation, its officers and agents, to refrain from further proceeding with the business of the corporation; for the appointment of receivers to take possession of the property of the corporation, subject to the order of the court; and for notice to the corporation to show cause why such injunction should not be made perpetual, and the receivers appointed as prayed for; and for such further orders and decrees in the premises as may be needful.

By the final decree of the court, the injunction, previously issued in said cause as prayed for, was made perpetual. Receivers were appointed to take possession of the property and effects of said corporation, and take charge thereof; to collect the debts due the corporation; to pay all debts due from said corporation, if the funds coming to their hands are sufficient therefor, and, if not, to distribute said funds ratably among the creditors of said corporation who duly prove their claims; and if there is any balance left in their hands, after paying the debts as aforesaid, to pay and distribute the same among the persons legally entitled thereto, all under the direction of this court. "And to this end, the said receivers shall have power to prosecute and defend suits in their own names, and do all other acts which might be done by said corporation if in being, for the purpose of settling any unfinished business thereof." The decree further commands all persons and corporations holding property or evidences of property of any kind belonging to said insurance company, to deliver the same to the receivers, and commands the receivers forthwith to take possession of the same. Then follows the portion of the decree upon which the argument of counsel is based. It is as follows: "It is further adjudged and decreed, that said corporation be, and the

same is, hereby dissolved." By virtue of this decree, it is claimed that the corporation ceased to exist for any purpose before the adjudication of bankruptcy; that the bankrupt law does not authorize process to issue in bankruptcy against defunct corporations or deceased individuals, or undertake to administer on their estates; that it acts only on the living and has no dealings with the dead, unless they die after the decree in bankruptcy. In this view of the case it becomes important to consider whether this corporation is so far defunct, whether its charter is so far annulled, and its franchise to be a corporation is so far taken away, by this decree, that it cannot be considered as having any being or existence for any purpose whatever.

We have already seen that such an act of annulling the charter and destroying the life of the corporation was not provided for in the section of the statutes under which the proceedings were commenced, nor prayed for in the petition upon which the decree was founded. It is true, nevertheless, that the decree does adjudge the corporation "dissolved," but we are satisfied that, by a fair construction of this language, as used in the concluding portion of the decree, it was the intention of the court only so far to dissolve the corporation as, in the language of the statutes under which they were acting, might "be needed to suspend, restrain or prohibit" the further continuance of the "business" of the company; and that it was not the intention of the court, by the use of this language, to make such a decree under the sixth section, on the application of the Insurance Commissioner, as by virtue of the eighth section, and under the other provisions of the General Statutes of the State, they might make in a process of *quo warranto* instituted by the attorney-general, adjudging the charter forfeited and annulled. In the language of text writers of statutes, and not infrequently of judicial decisions, the phrase "dissolving a corporation" is used sometimes as synonymous with annulling the charter, or terminating the existence of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of a corporation, without terminating its existence. This is *paralysis*, not *necrosis*; a suspension of corporate action, not a cessation of corporate life. As a solvent liquid or heat dissolves a crystal by separating the parts and breaking the continuity of the atoms which compose it, leaving it formless and invisible to the eye, yet with the capacity of being crystallized anew into its pristine form and beauty; as "a figure trenched in ice, which with an hour's heat dissolves to water and doth lose its form," and which an hour's cold may restore to its original form and substance; as a

meeting, a parliament or assembly, dissolved so as to suspend for a time its unity of action, yet existing with the capacity for a new aggregation of its original constituent parts, a corporation may thus, for certain purposes, be considered as so far dissolved as to be incapable of injury to the public, and yet retaining all the vitality which may be essential for the protection of the rights of others. This doctrine has been applied in several cases in the State of New York, in the construction of a statute of that State, concerning manufacturing corporations, which provided that, for all debts due and owing by the company at the time of its dissolution, the persons composing such company shall be individually responsible, &c. Under this statute, when an insolvent corporation suffered its property to be sacrificed, and the annual elections were omitted, and no act was done manifesting any intention to continue the corporate functions, the court, for the sake of the remedy against the individual members and in favor of creditors, presumed a virtual surrender of the corporate rights and "a dissolution" of the corporation. Yet, in these cases, the courts in New York did not decide that the companies had lost all their rights, or were defunct corporations; but only that, even if they had a right to reorganize themselves, and were, for certain purposes, in being, the case had happened in which they were "dissolved" for the purpose of remedial action by their creditors. *Slee vs. Bloom*, 19 Johnson, 456; *Penniman vs. Briggs*, 1 Hopkins, Ch. R., 300; S. C., 8 Cowen, 387; 2 Kent Com., 311, 312. But in the learned and exhaustive opinion of Judge Gray, in the case of *Folger vs. The Columbian Insurance Co.*, 99 Massachusetts, 267, is to be found the most perfect compendium of the law on this subject. In that case the Supreme Court of New York had adjudged "that the Columbian Insurance Company be, and it is, hereby dissolved." But the Supreme Court of Massachusetts did not hesitate to inquire whether the judgment thus obtained in New York, and relied on in Massachusetts, was rendered by a court having jurisdiction of the cause, and of the parties, and to decide that, to decree an absolute and final dissolution of a corporation at the suit of an individual, was no part of the general jurisdiction of a court of law or chancery, and can only be justified by express statutes; and then, after examining the express provisions of the statutes of New York, upon which the proceedings were based, to decide that, notwithstanding the Supreme Court of New York had adjudged the corporation "dissolved," and Chancellor Walworth had decided that such proceedings had effected "a virtual dissolution of the corporation," yet the Supreme Court of Massachusetts say, "It

does not extinguish its franchise, terminate its legal existence, or render it incapable of being sued, at law or in equity." In the light of this opinion, it is not difficult to see the proper construction to be given to the words of the decree of the Supreme Court of Massachusetts "dissolving" this corporation, as a dissolution adjudged by a court which had decided that such "a dissolution of a corporation can not deprive its creditors or stock-holders of their rights in its property; does not extinguish its functions, terminate its legal existence, or render it incapable of being sued, at law or in equity." See also *Coburn vs. Boston Papier-mache Manufacturing Co.*, 10 Gray, 243; *Taylor vs. Columbian Ins. Co.*, 14 Allen, 353; *Bacon vs. Robertson*, 18 Howard, 485-487; *Lum vs. Robertson*, 6 Wallace, 277; *Hunt vs. The Columbian Ins. Co.*, 55 Me., 291.

This doctrine in relation to the extinction of a corporation is not a novel one; for in 1862 it was adjudged, upon the authority of earlier cases, in the case of *Hayward vs. Fulcher*, Sir William Jones, 166, "that a dean and chapter were not dissolved by a surrender to the king of all their possessions, rights, liberties, privileges and hereditaments, which they had in right of their corporation." See also the case of the dean and the chapter of *Norwich*, 3 Coke, 75, *a*.

The court, therefore, entertains no doubt that this corporation still exists for the purpose of being proceeded against in bankruptcy.

The petition also assigns, as error in the decree of the district court, that the corporation had no right to appear in said court except by the receivers, and could not by counsel, against the objection of the receivers, appear, or admit by plea or otherwise, any matter of law or fact, and that the decree of the district court, basing its adjudication in bankruptcy wholly on the admission of Sandford, as counsel for the company, was erroneous. An examination of the record fails to convince the court that this assignment of error is sustained by the facts in the record, even if it were tenable in law. Granting, for the purpose of determining this question, that which the court is now called upon to decide, that the receivers were the sole and proper persons to represent the corporation, yet the only plea or answer made by them was a denial of the jurisdiction of the court in bankruptcy. This plea was heard, considered, and as we have seen, properly overruled. No answer was put in by them, or any person, denying the acts of bankruptcy; and, after the plea to the jurisdiction was overruled, no cause was shown by them or any one why a warrant in bankruptcy should not issue. If the president and attorney of the corporation, or those claiming to act as such, had no right to represent the corporation,

there was no denial of the allegations in the petition, and no cause shown why the warrant should not issue upon the application of the petitioners in bankruptcy and the accompanying proofs. The decree of the court was well founded upon the facts recited in the decree itself,—"It appearing that no denial of bankruptcy was made on the return day of the order to show cause"—without taking into consideration the other fact recited in the decree, that the corporation had by its answer admitted the acts of bankruptcy alleged against it. It is not necessary to determine to what extent the receivers have the authority to represent the corporation itself. But it is clear that, occupying the position they do, not as receivers under a mortgage or other lien or incumbrance on the property of the corporation, which might take the property out of the operation of the bankrupt law, but as receivers appointed under a State law applicable to insolvent corporations and to the distribution among the creditors of the assets of an insolvent corporation, they have no power to withhold the assets of the company and to liquidate its liabilities and affairs according to the mode provided by State laws for the liquidation of insolvent corporations. As well stated in *Thornhill vs. The Bank of Louisiana*, 10 B. R., 375. "this cannot be allowed. No mode of proceeding authorized by a State law can be permitted to have this effect. If the forfeiture under the State law of the charter of the bank, raises an obstacle to the jurisdiction of the federal courts, then the claim authorizing the forfeiture of the charter is suspended by the federal law. To hold otherwise, is to allow the States, by a particular form of liquidation, to override a law of congress, on a subject on which congress, by the constitution has supreme power." The sooner it is understood, that, now, when a uniform law of bankruptcy is in operation under the authority conferred upon congress by the constitution of the United States, no power exists to wrest from the jurisdiction of the courts in bankruptcy the assets of such bankrupt individuals and corporations as are within the scope of the provisions of the bankrupt Act, the more will the beneficent provisions of that Act be felt and appreciated by the mercantile community. Nowhere is this doctrine in relation to the effects of a bankrupt law upon the operation of the insolvent laws of the States more clearly and ably enunciated than in the learned opinions upon this subject to be found in the reported decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Petition for revision and reversal of the decree of the district court dismissed with costs.

SUPREME COURT OF MISSOURI,

MARCH TERM, 1872.

*Appeal from St. Louis Circuit Court.*DARWIN L. SHAW AND WILLIAM LOYD, *App'ts*,*vs.*ÆTNA INSURANCE COMPANY, *Resp't.**

The plaintiffs consigned five barges of ice, of which they were owners, to consignees to be sold on commission, and ordered them to have the ice insured. The consignees took the insurance in their own names, and after the loss assigned the policy to the plaintiffs.

A consignee has an insurable interest in goods consigned to him for sale on commission, only to the extent of the commissions or profits he expects to receive from the sale; and this he may insure regardless of instructions from the consignor.

If a consignee accepts a consignment, with instructions from his principals to insure for their benefit, it becomes his duty to insure, and if he neglects to do so, and a loss occurs, he is liable to them for that amount.

The consignees instead of taking out a new policy in the names of their principals, had the risk entered on their own policy, in their own names, as a convenient mode of indemnifying themselves against such damages as they might suffer in not insuring in the names of their principals. They had a right thus to protect themselves, and to this end they ought to be considered as interested to the full value of the ice.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors, and have insured in their own names, for them.

In such a case, in a suit upon the policy in the name of the consignee, the consignee might show that he had an insurable interest as trustee for his consignor.

ADAMS, J.

This was an action on a policy of insurance issued by defendant.

The plaintiffs filed a second amended petition, to which the defendant demurred, which was sustained, and judgment given on the demurrer against the plaintiffs, from which they appealed to the General Term, when the judgment of the Special Term was affirmed, and the plaintiffs have appealed to this court.

The petition substantially sets forth that the plaintiffs, being the owners of five barges of ice on the upper Mississippi river, consigned

* Decision rendered April 1st, 1872.

the same to Schirholz & Klinsmith, of the city of St. Louis, to be sold by them on commission; that plaintiffs ordered the consignees to have the ice insured, and that the consignees undertook the agency, and agreed to have the ice insured for plaintiffs. Instead of insuring the ice in the names of the plaintiffs, they made the insurance in their own names, to indemnify themselves in case of loss, as they would be liable for such loss, having disobeyed the instructions of their principals in not procuring insurance in their names. One of the barges of ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs, and this suit was brought by them as assignees for the value of the lost cargo.

The alleged ground of demurrer was that the consignees had no insurable interest in the ice.

A consignee, as such, has no insurable interest in goods consigned to him for sale on commission, unless it be to the extent of the commissions or profits he expects to derive from such sale. This he has the right to insure, regardless of any instructions from the consignor. But if he accepts a consignment with instructions from his principals to insure for their benefit, it becomes his duty to insure, and if he neglects to do so and a loss occurs, he is liable to them for the amount. The consignees in the case under consideration, instead of taking out a new policy in the names of their principals, had the risk entered on their own policy, in their own names, as a convenient mode of indemnifying themselves against such damages as they might suffer in not insuring in the names of their principals. I think they had the right to thus protect themselves, and to this end they ought to be considered as interested to the full value of the ice. See *Bartlet et al. vs. Walter*, 13 Mass. R., 267; *Oliver vs. Green*, 3 Mass. R., 133; *Herkimer vs. Rice*, 27 N. Y., 163.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors, and insured in their own names for them.

My impression is, that in such case the "positive stipulation of the underwriter to pay the loss to the agent would never be rendered void by the inability of the party really assured to sustain an action on the policy in his own name." See 2 Duer on Ins., Lec. 6, p. 7.

In such case the policy ought to inure to the benefit of the principal, and the agent or consignee treated as a trustee of an express trust, and the amount of recovery would go to his principal. But whether he is a trustee of an express trust or not, he is nevertheless a trustee for the consignor, and in a suit upon the policy in the name of the consignee

this may be shown in order to show that he had an insurable interest as trustee for his consignor.

The demurrer in this case ought to have been overruled.

Judgment reversed and cause remanded.

The other judges concur.

SUPREME COURT OF IOWA,

JUNE TERM, 1872.

Appeal from Dubuque Circuit Court.

MARY L. MILLER, *Appellee*,

vs.

THE MUTUAL BENEFIT LIFE INS. CO. *App't.**

A clause in the policy provided that if the assured should die by reason of intemperance from the use of intoxicating liquors, the policy should be void and of no effect. The defendant claims that the assured did die by reason of such intemperance, and that the policy was void.

The burden of proof on this defense rested upon the defendant, and it was not necessary for the jury to be satisfied beyond a doubt that the death was caused by intemperance; a preponderance of proof to that effect would authorize them to find for the defendant.

The weight and effect of the evidence most favorable to the plaintiff was that the assured died of congestion or from exposure, both of which were the direct consequence of his intemperate use of intoxicating liquors. This conclusion sustains the defense that he died from intemperance.

Upon this point there was no conflicting evidence, and the court below erred in overruling the defendant's motion for a new trial, on the ground that the verdict was contrary to the evidence.

This is an action upon a policy of insurance on the life of James A. Miller, late husband of plaintiff. There was a verdict and judgment for plaintiff. Defendant appeals.

ADAMS & ROBINSON and GRIFFITH & KNIGHT, *for Appellant*.

DEWITT C. CRAM and C. J. ROGERS, *for Appellee*.

BECK, CH. J.

* Decision rendered June 10th, 1872.

The policy, which is the foundation of this action, contains a condition to the effect that, in case the party whose life is therein insured, James A. Miller, shall die "by reason of intemperance from the use of intoxicating liquors," the instrument shall be void and of no effect. As a defense to the action, defendant pleaded that the said James A. Miller did die by reason of intemperance, from the use of intoxicating liquors, and thereby the policy became null and void, and plaintiff is defeated of her action thereon. Other issues were raised by the pleadings, but in the view we take of the case, their consideration is unnecessary.

Upon the issue presented by the defense just stated, evidence was introduced by the parties, and the cause was submitted to the jury, who were instructed to the effect that, in case they found Miller died from the intemperate use of intoxicating liquors, their verdict should be for defendant. They were also informed by the court that the burden of proof upon this defense rested upon the defendant, and that it was not necessary for them to be satisfied beyond a doubt of the fact of Miller's death from intemperance, but a preponderance of proof to that effect would authorize them to find for defendant.

In addition to the general verdict for plaintiff, the jury returned special findings, in answer to interrogatories, in substance that Miller did not die by reason of intemperance from the use of intoxicating liquors, but that the cause of his death was congestion of the lungs and brain.

A motion to set aside the verdict on the ground that it is contrary to the evidence, was overruled. This ruling constitutes one of the grounds of the assignment of errors, and is the only one that need be considered by us.

The correctness of the instruction of the court below upon the point of law above stated, is not questioned by appellee's counsel. Our duty will be fully discharged in passing upon the verdict, viewed in the light of the evidence before the jury.

In our opinion the verdict cannot be sustained; it is palpably and grossly in conflict with the evidence, and could only have been rendered under the influence of passion or prejudice. Upon the question involving the cause of the death of Miller, the testimony points but one way: that he died from intemperance in the use of intoxicating liquors, there can be no doubt. There is nothing within the whole record that can be dignified into the importance of creating a conflict of evidence on this point. He was shown to have been an intemperate man for years, often given to paroxysms of gross intoxication.

He would drink to insensibility, and protract these debauches until nature failed to supply strength necessary to enable him to continue his indulgences. He had seasons of sobriety which would continue for months. His debauches were not very protracted as to time, but most violent in excess. In one of these, after having spent three days at a "saloon," drinking, as was his wont on such occasions, and leaving it neither at night nor in the daytime, he was assisted home by the one who had dealt him the poisonous beverage, and supplied with a bottle of liquor to which he could have access at his own house. Soon after a physician was called in, who found him suffering under an attack of *delirium tremens*. He rapidly grew worse, and died from the disease. The physician testifies that his death was caused by the disease just named, which was the result of the intemperate use of intoxicating liquors. Not a single witness gives evidence contradicting the foregoing statement of facts. The only testimony that forms even the basis of an argument in support of the verdict of the jury, is the affidavit of the physician, (the same who attended him in his last sickness), to the effect that he died of exposure and intemperance. The affidavit was prepared and used to establish Miller's death, upon application to the defendant for payment of the policy. The physician also, in his evidence at the trial, stated he had died of congestion of the lungs and brain, caused by excessive indulgence in the use of intoxicating liquors. In explanation of the evidence, it is shown that Miller, in his delirium, escaped from those having charge of him, and was thereby exposed, in his underclothes, while running at large in the city, to the inclemency of the weather. It further appears that congestion of the lungs and brain was a consequence of his indulgence in intoxicating liquors, and was an attendant of the disease produced thereby. All that can be said of this evidence, giving it the weight and effect claimed by appellee's counsel, is that Miller died of congestion or from exposure, both of which were the direct consequence of his intemperate use of intoxicating liquors. This conclusion sustains the defense that he died from intemperance.

Discredit is attempted to be attached to the evidence of the physician, by the testimony of plaintiff, as to certain statements made by him to her. He denies or explains these statements, and her evidence is unsupported. Of course the witness' testimony is unaffected by this attack.

Upon evidence of this character, the jury based their special finding that Miller did not die from intemperance, and their general verdict for

plaintiff. These findings ought not to have been permitted to stand by the court below.

For the error in overruling defendant's motion for a new trial on the ground that the verdict is contrary to the evidence, the judgment of the circuit court is reversed.

UNITED STATES SUPREME COURT.

EASTERN DISTRICT OF MISSOURI.

SCOTT, *et al.*, Plaintiff,

vs.

THE HOME INSURANCE CO., *Def't.**

It was claimed by the defendant, in a suit upon a policy, that the plaintiffs willfully set fire to the property insured.

The degree of proof in this case is not the same as if the plaintiffs were on trial, under an indictment for willfully burning the property to defraud the insurance company. The rule in civil cases applies here.

In order to justify the jury in finding that the plaintiffs burned, or caused the property to be burned, the evidence taken together must be such as to clearly satisfy them of the truth of the proposition. It need not be such as to exclude all doubt.

Confessions extorted from the plaintiffs are to be entirely disregarded. Free and voluntary confessions only, should be regarded.

The jury are the exclusive judges of the weight of evidence.

—, J.

The questions of facts specially submitted to you, require at the hands of the court a statement of the rules of law applicable to the decision of such questions. The second interrogatory requires you to find "whether the plaintiffs, or either of them, caused, procured, planned, or instigated the burning, or whether either of them set fire to the building, consented to, or connived at the burning?" The charge of willful burning is made by the defendants, and must be proved by them.

In the trial of ordinary civil suits, like the present, the jury determines the issues upon what is called the weight or preponderance of

* Decision rendered April term, 1870.

evidence. If the evidence preponderates in favor of the plaintiff, he is entitled to a verdict, though the evidence may not be so strong as to exclude all reasonable doubt. So, if the balance is in favor of the defendant, the finding should be for him, although the jury are not convinced beyond all possible, or even beyond all reasonable question. This is the ordinary rule in civil actions. In criminal cases, where the United States or the government is plaintiff, the rule is different, and no mere weight of evidence is adequate to warrant a verdict of guilty, unless it be sufficient to exclude all reasonable doubt.

One of the issues submitted requires you to find whether the plaintiffs set fire, or caused fire to be set, to the insured property; and it becomes the duty of the court to instruct you respecting the degree of proof essential to enable you to find that issue against the plaintiffs, and in favor of the insurance company:

1. The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for willfully burning the property to defraud the insurance companies. On the contrary, as between the rule in criminal and the rule in civil cases, as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men in general will not commit, but of which men are sometimes guilty; in view of which, the court instructs you that in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence taken altogether, must be such as clearly satisfies you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused or procured the act in question to be done.

On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule of law on the subject.

2. As to the question whether any or what weight should be given by you to the confession in evidence, the court instructs you that any confession extorted from either of the plaintiffs, are to be entirely disregarded. It is a free and voluntary confession only that should be considered by you. It should be observed, however, that in a case like the present, confessions made from hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence, and should be weighed by you with a view of ascertaining the exact truth.

In your deliberations you will bear in mind the distinction between

the evidence outside of the confessions, and the confessions themselves. Though you should arrive at the conclusion to disregard all confessions, yet, if evidence outside of the confessions satisfies your mind of the truth of any matter in issue, you will find accordingly. You are the exclusive judges of the weight of evidence. You may regard or disregard portions, or all of the testimony given by any witness, attribute little or great weight to the whole, or such portions as you may regard; in fine, deal in your deliberations with the testimony as you may deem proper, always bearing in mind, however, the object,—arriving at the truth of the matters submitted to you.

Verdict for defendants.

TREAT and KREKEL, JJ., concurred.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1870.

Appeal from Circuit Court of DeKalb County.

THE AURORA FIRE INS. CO., *Appellant*,
 vs.
 JAMES W. EDDY, *Appellee*.*

Keeping "buckets filled with water" in the building insured. It has been held, that under a stipulation in a policy, that the assured shall keep a certain number of "buckets filled with water" in the building insured, "ready for use at all times, in case of fire," if, from freezing or other unavoidable causes, a literal compliance therewith should become impossible, the policy shall not, for that reason, become void, but it would still be incumbent on the assured to show that the requisite number of buckets, in good and serviceable condition, were at the places designated in the policy, ready for instant use.

Prohibition of smoking. Under a clause in a policy, "that smoking shall be strictly prohibited in or about the buildings" insured, the mere fact that there may have been smoking therein, but without the knowledge of the assured, and contrary to his directions, will not operate to discharge the company. It is enough that the assured had prohibited the act, and used reasonable precautions to prevent it.

Of a change of title—what constitutes—of a mortgage. It has been held, that a mortgage upon insured premises is not a sale, alienation, conveyance, transfer or change of title, within the meaning of a clause in a policy which prohibits a transfer or change of the title without the consent of the insurer.

* Decision rendered February, 1871.

And this rule is especially applicable where the assured held only an equity of redemption in the insured premises, the same being mortgaged at the time the policy was given, and he merely executed another mortgage to a different person, and for a different amount, and applied the proceeds to the payment of the prior incumbrance, and to other purposes.

Rule of construction. The right to insist upon the forfeiture of a policy under such a prohibitory clause is *stricti juris*. Liberal intendments and enlarged constructions will not be indulged in favor of such forfeitures. The objection must be brought clearly within the forfeiting clause or it will not avail.

Of a change in the use of the premises. Where a building is being used as a "flax factory," and is insured as such, the assured may properly erect therein and operate machinery for the manufacture of rope, that mode of using the building being embraced in the term "flax factory," and is not within a clause in the policy prohibiting a change in the character and degree of the risk.

Representations by agents—how far binding on the company. Even if the use of the building for the manufacture of rope, when it had been insured as a "flax factory," could be regarded as a violation of the terms of a condition in the policy in respect to increase of hazard, still, where the agent of the company, who was authorized to take risks, in answer to an inquiry by the assured, at the time of issuing the policy, assured him such use of the premises would not be in violation of the contract—that the term "flax factory," used in the policy, was broad enough to include the manufacture of rope, the company would be estopped by such declaration of their agent.

The agent in such case would be acting within the scope of his authority. Being authorized to take risks, an insurance agent is thereby empowered to give a construction to the written portions of a policy issued by him, at least.

Of a warranty as to the use of stoves in the building—whether continuing. An applicant for insurance upon a building was asked, "How is the building warmed? If any stoves and pipes, how are they secured?" The answer was, "No stoves used." This was held to be a representation only as to the use of stoves in the building at that time, and was not a continuing one, nor a warranty that stoves should not be used for warming purposes.

It is improper to instruct a jury that a party, in order to recover, must prove that he has "substantially complied with his contract." Such a form of instruction is calculated to mislead a jury.

Promise of the officers of an insurance company to pay a policy. It is competent, in an action upon an insurance policy, for the plaintiff to prove that the president and secretary of the company promised to pay the loss.*

This was an action of assumpsit, brought by James W. Eddy, against the Aurora Fire Insurance Company, to recover upon a policy of insurance upon a building used as a "flax factory," for a loss occasioned by the destruction of the property by fire.

The policy, among other things, contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water on the first floor, where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire. Also, that smoking shall be strictly prohibited in or about the buildings." It also provided that "if the title of the property is transferred or changed, or the policy is assigned without written permission hereon, this policy shall be void."

Other features of the policy, involved in the controversy, are fully disclosed in the opinion of the court.

A trial in the court below resulted in a verdict and judgment for the plaintiff. The company appealed.

* Syllabus and statement of the case, by S. L. Freeman, Esq., State Rep'r. Ill.

B. F. PARKS and CHAS. HITCHCOCK, *for Appellants.*

WHEATON & McDOLLE, *for Appellee.*

WALKER, J.

This case was previously before this court, and is reported in 49 Ill., 106. It was then reversed, because erroneous instructions were given. There was a stipulation in the policy, that the assured should keep eight buckets filled with water on the first floor, where the machinery was run, and four in the basement, by the reservoir, ready for use at all times in case of fire. In considering the case, when previously before us, we held, that a reasonable construction of this clause required, that while, from freezing or unavoidable causes, a literal compliance with the warranty might have been impossible, and could not have been in the contemplation of the parties, still, it was incumbent on the assured to show that the required number of buckets, in good and serviceable condition, were at the places designated in the agreement, ready for instant use.

This being the requirement, it devolved upon the assured to prove that he had complied therewith.

On that question, there was some contrariety in the evidence, which the jury were required to reconcile, or, if unable to do so, then to give weight to such as they believed to be true.

In such cases, it is the province of the jury to carefully weigh the whole of the evidence, and to find according to its weight, and the presumption is that they have done so, unless we see from the record that they misunderstood or disregarded the proof. The court will not disturb their finding on any question, unless it appears clearly to be unsupported. In this case, while we might have arrived at a different conclusion, we are not prepared to say that there were not the required number of buckets in their places, in good order and ready for instant use.

The testimony on this question introduced by appellee is more positive and affirmative in its character than that of appellants. The witnesses of the latter, in the main, only say they did not see the buckets, but failed to state that they had searched for the buckets, or had their attention called to the matter. It is true, that two of them say they had, at one time, occasion to use some buckets but only found six. This may have been true, and the proper number still have been in the mill. Dodds, on his examination in chief, seems to be positive as to the want of buckets, but the value of this testimony is greatly impaired by his cross examination, when he was not at all

positive on the subject. On the other hand, appellee's witnesses all examined expressly to see if the buckets were there. At most, it seems to be no more than doubtful whether the buckets were all there, but it is by no means clear, nor is there a clear preponderance of evidence, that there was not the requisite number.

It is next urged that there was smoking allowed in the factory, contrary to the stipulation in the policy. It was agreed, that smoking should be strictly prohibited in and about the premises. Eddy swears he prohibited smoking in and about the buildings, and this was a literal compliance with his part of the agreement to prohibit smoking.

In the case of *The Insurance Company of North America, vs. McDowell*, 50 Ill., 121, it was stated, in answer to a question propounded to the assured, and which became a part of the conditions upon which the policy was issued, that smoking was not allowed. And it appears there had been smoking by some of the employees about the mill, but as soon as the attention of the assured was called to the fact that it was contrary to the terms of the policy, he forbade it, and put up a notice that it was not allowed. It was there held, that in such a case the assured only undertakes that he himself will not do the act, or allow others to do so, if by reasonable precaution he can prevent it.

In this case, appellee prohibited smoking, and there is no evidence that he had any notice that his orders had been disregarded, so as to require him to resort to other and more energetic steps for its prevention. He did not agree that, if there should be smoking in or about the buildings, the policy should be void. He, or any man who is at all qualified to transact the most ordinary business, would not enter into such an engagement, as strangers and others over whom he had no control were liable to smoke about the buildings. Had the evidence shown that his orders were disregarded, and that it had come to his knowledge, then a different question would have been presented for our consideration. But the jury were, under the evidence before them, warranted in finding appellee had used reasonable efforts to prevent smoking in or about the buildings.

It is next urged that there was a violation of the condition, that if the title to the property should be transferred or changed, the policy should be void. It appears that when the property was insured, Eddy was only the owner of the equity of redemption, Town then holding a mortgage on the premises, and loss, if any, was payable to Town, as his interest might show. Subsequently, appellee conveyed the premises, with other property, to Brown, and he, at the same time, and as

a part of the same transaction, gave back to appellee a defeasance. This arrangement was made to enable Eddy to take up his mortgage to Town, which was done, and to procure means for other purposes. That this conveyance and defeasance only constituted a mortgage, is so obvious that the citation of authorities to establish the proposition is wholly unnecessary.

The question is then presented whether the execution of a mortgage on the premises was such a change or transfer of the property as rendered the policy void. It was but an equity of redemption that was insured, and this transaction still left appellee as fully the owner of the equity of redemption as he was at the time the insurance was effected. This was not, therefore, any change or transfer of title in appellee, but the only change was, that a different person held the mortgage, and it was, perhaps, for a different amount. But appellee's title was the same. But even if this were not so, still, the execution of a mortgage on the insured premises has been held, in the case of the Commercial Ins. Co. vs. Spankneble, 52 Ill., 53, not to be a sale, alienation, conveyance, transfer, or change of title, such as is prohibited by a similar clause in a policy, and that the right to insist upon such a forfeiture is *stricti juris*; that liberal intendments and enlarged constructions will not be indulged in favor of such forfeitures. They must be brought clearly within the forfeiting clause. This, then, disposes of that question.

It is also urged that, erecting and putting into operation machinery for the manufacture of rope increased the hazard and avoided the policy. It appears that at the time the risk was taken appellee notified the agent that he intended to put in rope machinery, and he inquired whether it would affect the policy, and was informed it would not, as the term flax factory was broad enough to embrace it, and we have no doubt he was correct in his definition of the term flax factory. It is believed to be quite common in such establishments to manufacture rope. It is a usual part of the business, and for that reason we incline to the opinion that this was no breach of the condition. But if it was, still the agent of the company assured appellee that it would not be, and shall appellee be misled when he is procuring a policy, and induced to take one that he intends, and the agent of company assures him is broad enough to cover rope works, when it does not, and shall appellants now be heard to say, It is true our agent misled appellee, and induced him to do an act that we knew would avoid his policy, and thus enable us to obtain the premium when we incurred no risk? A court of justice would never sanction such a fraud, and thus enable

parties to obtain and enforce such an unjust advantage. The agent was acting within the scope of his authority, and was, when appellants authorized him to take policies, empowered to give a construction to the written portion of the policy, if no more, and the company must be 'held estopped by this declaration of their agent. The instruction given on behalf of appellee, on that question was proper.

It is also urged that there was a breach of the warranty in the policy, that no stoves were used. The question was asked, "How is the building warmed? If any stoves and pipes, how are they secured?" To this it was answered. "No stoves used." Appellee agreed in the application, that if any untrue answer was given therein the insurance was to be void, and the policy of no effect. It is not contended that the buildings, or any part of them, were then warmed by a stove, but that one was subsequently used for the purpose, and that this representation was a continuing one, and was a warranty that a stove would not be used for warming purposes. In the case of *Schmidt vs. The Peoria Marine & Fire Ins. Co.*, 41 Ill., 295, a similar representation was held not to be a continuing warranty that there should be no fire in the tannery, except under the boiler, as represented, during the life of the policy, but only a representation of the condition of the property at the time the policy was issued. We will not give a forced construction to language to enable a party to enforce a forfeiture, but rather adhere to the natural import of the words used. In this case the questions and answers are in the present and not in the future tense.

The use, then, of the stove was not a breach of the warranty. But if used recklessly it might be regarded as increasing the risk. Dodd testifies that on the evening of the loss he made a fire and heated it red hot. But he says that the principal or foreman, or Eddy, was not there, and he says Ticknor, Turner or Eddy never directed him to make a fire in the stove, and he says "the bosses" did not want him to make the fire, but he was asked to do so by the girls who worked in the factory, that they might warm their feet before going home. Hoborn also testified, that he had seen fire in the stove and that he had seen it red hot. Other witnesses, who had better opportunities of seeing and knowing the facts, speak of seeing fire in the stove, but do not speak of its being unusually hot: and it was for the jury to say, whether it was used in a grossly negligent manner, and they have found it was not, and seem not to have given much weight to the evidence of Dodd and Hoborn, and from the uncertainty they manifest in reference to other matters about which they testify, we

are not prepared to say that it was entitled to receive more weight than was given to it.

Appellants asked, but the court refused to give this instruction :

"The jury are instructed, that so far as relates to the question of buckets, the policy requires that the plaintiff must keep 'at all times ready for use in case of fire, four buckets of water' in the basement story and eight buckets on the middle floor; and the plaintiff must show affirmatively that he did substantially so keep said buckets of water, and if he has not proved these facts, the jury must find for the defendant."

While this instruction may not be entirely incorrect, it was certainly calculated to mislead. What would amount to a substantial compliance with a contract, is very indefinite, and a question about which well founded differences might exist. This form of instruction was held to be erroneous when this case was previously before this court. We then but followed the decision on the same point in the case of *Taylor vs. Beck*, 13 Ill., 376. The court below had already given an instruction, clear, definite, and free from misapprehension on this question. It was this :

"If the jury believe from the evidence that buckets could not be kept in the mill filled with water all the time, in accordance with the literal provisions of the policy, because of freezing, then a literal compliance with the said provisions of the policy concerning buckets, was not required and could not have been in the contemplation of the parties when the policy was made, but all that was required by the plaintiff in order to comply with such stipulation was to have the required number of buckets in good and serviceable condition at the proper places ready for instant use."

This is the construction we gave in the former opinion, on the previous trial. The instruction on this point, as well as all others, is free from objection. It presented the law of the case fairly to the jury.

It is objected that the court below permitted appellee to introduce evidence tending to prove a promise by the president and secretary of the company to pay the loss, after it had occurred. The evidence was proper for the consideration of the jury. It might reasonably be inferred from such evidence, that these officers had carefully examined the circumstances of the loss, and become convinced it was a fair one, and was properly payable. It would certainly be evidence to that, to no greater extent, and it was clearly admissible.

After a careful examination of this record, we fail to perceive any

error requiring a reversal of the judgment. and it must, therefore, be affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS,

JANUARY TERM, 1872.

Appeal from Sangamon County Circuit Court.

THE REAPER CITY INSURANCE CO., *Appellant*, }
vs. }
WILLIAM R. JONES, *Appellee*.*

A clause in the policy provided that the policy should be void if gunpowder was kept in the house without written permission, and that nothing less than a distinct agreement indorsed on the policy should be construed as a waiver of any condition or restriction. The insured at the time of the loss, had on hand a few pounds of gunpowder, kept with the knowledge and express permission of the company's agent.

The company was chargeable with the act of the agent in giving permission to keep the powder, and as the provisions for forfeiture were made solely for the benefit of the company, it must be regarded as having waived it, upon the principle that what is exclusively for its benefit it can enjoy or not as it pleases.

J. C. & C. L. CONKLIN, *for Appellant*.

STEWART, EDWARDS & BROWN, *for Appellee*.

THORNTON, J.

One clause in the policy sued on made it void if gunpowder was kept in the house without written permission, and, it was further declared, that nothing less than a distinct agreement indorsed on the policy should be construed as a waiver of any condition or restriction.

The assured at the time of the loss had on hand a few pounds of gunpowder kept with the knowledge and express permission of the agent of the company. A previous policy had been issued by the same agent, upon the same property; all premiums had been paid upon both, and accepted by the company; and the agent knew that

* Decision rendered June 24, 1872.

the powder was kept, and expressly permitted it without calling the attention of the assured to the particular condition of the policy. Did the failure to have the consent of the company endorsed upon the policy, under such circumstances, render it void? This is the only question in the case.

The clause in the policy making it void if gunpowder was kept in the store was for the benefit of the company. It might waive the effect of the condition, and as it performs its business through agents, their acts must often operate as a waiver of the conditions in a policy. During the existence of the two policies to the assured, the company must have been cognizant of the acts of its agent and of the privileges which were granted to the assured. Yet the premium was promptly paid, and duly received by the company, and no notice was given that the policy had been violated or that the contract must terminate, but the assured was authorized by the recognized agent to continue the storage of the powder in the store. With a full knowledge of all the facts, the company takes the money of the assured, with the determination at the time to resist the payment of loss, should any occur. This was not only a fraud, but a deceit which the law can never sanction. The defense set up is destitute even of the semblance of justice. The company was chargeable with the act of the agent in giving permission to keep the powder, and as the provision for forfeiture was made solely for the benefit of the company, it must be regarded as having waived it, upon the principle that what is exclusively for its benefit, it can enjoy or not as it pleases.

Some of the interdicted articles are gunpowder, saltpetre, nitrate of soda, petroleum, benzine, gasoline, spirit of gas, or any burning fluid. Such conditions, printed, as they usually are, in the smallest type, and read with great difficulty, are but traps when the attention is not called to them. There is scarcely a housekeeper in the State who does not keep on hand some one or more of the prohibited articles. With knowledge of the fact on the part of agents, and when no notice is given of the stringent character of the condition, but specific authority is granted to continue to keep the articles, the company waives the forfeiture. The principles enunciated in the following cases control this case: *Atlantic Ins. Co. vs. Wright*, 22 Ill., 462; *N. E. Fire & M. Ins. Co. vs. Schettler*, 38 Ill., 166; *Com. Ins. Co. vs. Spankneble*, 52 Ill., 53; *Phoenix Ins. Co. vs. Slaughter*, 12 Wall., 404. We think that the judgment should be affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1871.

Appeal from Stephenson County Circuit Court.

THE WINNESHEIK INS. CO., *Appellant*,*vs.*REGINA SCHUELLER, *Appellee*.*

Every material averment of the declaration must be proved, to entitle the plaintiff to recover.

The policy required proof of loss within thirty days after its occurrence. When the secretary of the company was first notified of the loss, he gave the appellee a blank on which to make her proof of loss. When this was filled up and returned to him, he examined it and made no objection to it, except to erase a few articles, and retained the paper, and did not require any further proof or the performance of any other act. The account of the loss thus delivered was not formally correct, and some of the requirements in the conditions of the policy were omitted. *Held*, that the company waived any omissions or irregularities in the proof of loss delivered. Good faith required that the company should apprise the insured of any objections entertained, before she lost her right to supply defects and omissions.

The personal examination, provided for by the policy and made by the officers of the company, after the expiration of the thirty days from the fire, constituted no part of the proof required on the part of the insured.

By the terms of the policy the amount of loss or damage was not payable for ninety days after due notice and proof. This time is to be reckoned from the date of delivering the proof of loss to the secretary of the company, and not from the time of the personal examination.

The court below properly instructed the jury that certain facts, if proved, were a waiver of further proofs of loss. The jury find the facts and the court determines the law. Whether certain facts have been proved or not must be ascertained by the jury. Whether or not they amount to a waiver, when proved, the court must decide.

The averment in the declaration that the insured was the owner, is equivalent to an averment of an estate in fee.

The court below properly overruled the objection to the introduction, in evidence, of a deed conveying the property to the appellee. It was some evidence of title, and the appellee was under no obligation, prior to its introduction, to produce the deed to her grantor.

The evidence showed that the appellee was in actual possession at the time of the loss, and had been for seven years prior thereto. Actual possession, accompanied with claim of fee, raises the presumption of an estate in fee.

One of the jurors, on challenge, said he had some prejudice in his mind against insurance companies generally, and that his prejudice was founded on the fact

* Decision rendered January, 22d, 1872.

he could not comprehend their proceedings, but that the prejudice would not affect his verdict.

It is the duty of this court to revise the action of the court below in all cases as to the competency of jurors. It was error in the court below to overrule the challenge.

This court will not grant a new trial or reverse a judgment on error for misdirection of the court below, if it appears from the entire record that justice has been done, and that the errors complained of could not have affected the merits of the case or influenced the action of the jury.

THORNTON, J.

Numerous errors have been assigned for a reversal of this judgment. It is objected that there is a material variance between the declaration and the proofs.

Every material averment in the declaration must be proved, to entitle the plaintiff to recover. One of the conditions of the policy required proof of loss within thirty days after its occurrence. The declaration avers that within the time a schedule of the property, with affidavit thereto attached, was delivered by appellee in person, to the secretary of the company, and that the company then waived any further proofs of the loss, and all conditions of the policy requiring appraisalment.

The account of the loss thus delivered was not formally correct. There were omissions of some of the requirements in the condition of the policy. The schedule, however, had a description of the dwelling house and saloon, and a long list of the furniture, &c., burned, and was sworn to before a magistrate. Were these omissions waived by the act of the agents of appellant? It was in proof that when the secretary was first notified of the loss, he gave the appellee a blank, on which to make her proofs of loss. This was filled up and returned to him. He examined it, and made no objection to it, except that a few articles were not covered by the policy, and erased them. He retained the paper, and did not require any further proof, or the performance of any other act. During the thirty days appellee visited the office of the company on different occasions, after she had delivered her proof of loss, and no additional requirement was made, and no objection preferred.

But it is insisted that the personal examination of appellee, after the expiration of the thirty days from the fire, was a part of the proof of loss, and that the waiver on the part of the company was only as to information not furnished by the personal examination in connection with the written proof. The personal examination made by the officers of the company constituted no part of the proof required on the part of the assured, by the condi-

tion. It requires that the assured shall make out a written account of the loss within thirty days thereafter, and deliver it at the office of the company. This is a duty incumbent upon the assured which must be performed unless waived. The personal examination is entirely optional with any officer of the company. The assured must submit to it, but cannot enforce it. If the corporation desired this personal examination, in aid, or as explanatory of the proofs submitted by the assured, it should have insisted upon it within the thirty days. It cannot be permitted to postpone such examination for the purpose of involving the assured in difficulties, and entrapping her into a violation of the condition of the policy. As to the acts of the agents of the company, which conduced to waive its rights, the evidence is entirely satisfactory. We are clearly of opinion that it had waived any omissions or irregularities in the proof of loss delivered, and that there is no variance.

Error is assigned upon the refusal of the court to give the 12th and 14th instructions asked by appellant. They involve the question already discussed. They are based upon the idea that the personal examination of the assured, after the expiration of thirty days from the loss, forms a part of the proof referred to in the condition of the policy, which must be made by the assured. As we have already said, they are wholly distinct. One must be done: the other may be done. Even if the personal examination at any time might constitute proof of loss, it could never, when made after the lapse of the thirty days. The opposite construction would enable these corporations to delay the examination and thus compel the forfeiture of the policy.

According to the view we have heretofore taken of the evidence, there is no force in the objection that the suit was prematurely brought. According to the terms of the policy, the amount of the loss or damage was not payable for ninety days after due notice and proof. The schedule of the property which was made, and which we hold to have been sufficient, according to the evidence, was delivered to the secretary of the company on the 11th day of May, 1870. The suit was commenced on the 23d of August following, making one hundred and four days after the proof of loss. It was not error to refuse the 13th instruction in behalf of the appellant. It is founded upon the assumption, which is held to be erroneous, that the personal examination of the assured was a necessary part of the proof of loss.

The first instruction given for the appellee was clearly right. It informed the jury that the personal examination was no part of the preliminary proofs of loss. This is the true construction of the con-

dition in the policy. The averments in the declaration did not impose the proof of such examination upon appellee. When she had proved the delivery of the schedule and the acts of waiver, she had made a *prima facie* case, as to the proof of loss. She was not bound, as assumed by counsel, to prove the personal examination, and all the acts of the company by its officers, in order to constitute a waiver. She need only to show acts which were sufficient to convince the jury that the company had waived any irregularity in the proof of loss. When this was done, the law did not burden her with the ridiculous labor of accumulating testimony. The last clause of the instruction is not objectionable. The refusal to submit to the examination was solely a matter of defense. The language clearly indicates this view. It is susceptible of no other construction. The language of the condition is: "The assured shall forthwith give notice of any loss to the secretary of the company, and within thirty days after such loss shall deliver at the office of the company, &c., a particular account of such loss," and then proceeds with particular specifications. The condition then contains the following: "And the assured shall, if required, submit to an examination, &c." The requisition for the examination must proceed from the company. The assured must yield to it only upon demand. Upon demand, followed by submission or refusal, then, the company may prove the facts. The effect of refusal is not involved in this case, as the assured did not refuse. The examination was had after the expiration of the time in which to perfect proofs of loss, and formed a part of the evidence introduced by the company. It was used, as avowed, merely to show the fact of examination. For the purpose offered, it was wholly immaterial. It might have been used in rebuttal, with a view of contradiction, but taken at the time it was, it could not be offered as any part of the preliminary proofs, nor could the bare fact of examination constitute any defense, under the circumstances.

Objection is also made to the second instruction given at the instance of appellee. It is contended that the court should not have instructed the jury, that certain acts, if proved, were a waiver of further proofs of loss, and that the instruction should have been that the acts enumerated were only evidence of a waiver. The jury find the facts, and the court determines the law. Whether certain acts have been proved or not, must be ascertained by the jury. Whether or not they amount to a waiver, when proved, the court must decide. We have already expressed the opinion that the acts in question did constitute a waiver. The assured was, after the fire, frequently at the

office of the company, and in communication with its officers, before the lapse of the thirty days mentioned in the condition. Good faith required that the company should apprise the assured of any objections entertained, before she lost her right to supply defects and omissions. *Peoria Marine & Fire Ins. Co. vs. Lewis*, 18 Ill., 553; *Great Western Ins. Co. vs. Staaden*, 26 Ill., 361; *Turley vs. The N. Am. Ins. Co.*, 25 Wend., 374; *Ætna Ins. Co. vs. Tyler*, 16 Wend., 385.

It is claimed that there was not sufficient proof of title to the property. The averment in the declaration was that the assured was the owner, and it is contended that this is equivalent to an averment of an estate in fee. Such was its effect. Did the failure to procure a regular paper title defeat the right to recover? A deed conveying the property to appellee was introduced and read to the jury. It was objected to at the time, but the objection was properly overruled. It was some evidence of title, and appellee was under no obligation, prior to its introduction, to produce the deed to her grantor.

The evidence shows that the property destroyed was the same as that mentioned in the policy; that the company designated it in the policy as the dwelling house and saloon of the appellee; that she was in actual possession at the time of the loss, and had been for seven years prior thereto; and that she held the property by virtue of the deed introduced. On the trial no exception was taken to the parol testimony. This case was unlike the one referred to by counsel—*Illinois Mut. F. Ins. Co. vs. Marseilles Man'f'g Co.*, 1 Gil., 236. In that case the only evidence as to title was, that the defendants in error were the owners of the buildings only and not of the land. In this case there is proof of an actual occupancy. Appellant asked no instruction as to the insufficiency of the evidence. Its silence dispensed with the production higher and better evidence. *Clay et al. vs. Boyer*, 5 Gil. 506.

The actual possession accompanied with claim of the fee, raises the presumption of an estate in fee. *Mason. vs. Park*, 3 Seam., 532; *Brooks vs. Bruyn*, 18 Ill., 539. The position of counsel is not defensible.

But it was error to overrule the challenge of the juror Samuel Askey. He said that he had some prejudice in his mind against insurance companies generally; that his prejudice was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict.

A man may have a prejudice against crime; against a mean action; against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a juror to pre-judge an innocent

and honest man. As to this juror, the feeling he entertained against insurance companies was of a bigoted and reprehensible character. It was not founded upon any knowledge or information of conduct which should condemn them, but merely upon the fact of his inability to understand the proceedings of these corporations. They must, then, disclose all their operations, open to him all their business transactions, in order to remove his suspicion. His prejudice, based upon the reason assigned, must have been deep seated, and would necessarily have affected his verdict. A juror should stand indifferent between the parties. No bias should influence his judgment, and swerve him from strict impartiality. It would have required as much evidence to remove his unfounded prejudice as to convince him of the justice of the defense. The juror said that he had no more prejudice against this than any other company, but that he had a prejudice against all insurance companies. How is it possible that his mind would not be biased, and his determination to some extent influenced? It is not necessary that his unfavorable impressions should be so strong that they cannot be shaken by evidence. It is sufficient if proof be necessary to restore his impartiality. A party should never be compelled to produce proof to change a preconceived opinion or prejudice which may control the action of the juror. A preconceived prejudice against a party may be as difficult to remove as an opinion. A prejudice is in some sense an opinion. In Burr's case, Chief Justice Marshall said, "Those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection." 1 Burr's Trial, 416.

The counsel for appellee insists that this was a challenge to the poll for favor and not for principle cause; that the judge was selected as the trier, and that his finding is conclusive, unless he committed some error of law. Such has never been the practice in this State, and we think it is the better rule, and that it is our duty to revise the action of the court below, in all cases, as to the competency of jurors. The question arises, Shall the judgment be reversed for this error of the court? Was the company prejudiced thereby? The rule of this court, established by its earliest decisions, and persistently adhered to is, that it will not grant a new trial or reverse a judgment on error, on account of the admission of improper or the rejection of proper evidence, or for misdirection of the court below, if it appears from the entire record that justice has been done, and that the errors complained of could not have affected the merits of the cause, or influenced the action of the jury. *Greenup vs. Stoker*, 3 Gil., 202.

The errors assigned are errors of law. We hold that the ruling of the court was right, and the jury were bound to take the law from the court. The only issue of fact contested was as to the sufficiency of proof of loss. The waiver of the irregularity in the proof was amply established by uncontradicted proof. The acceptance of the schedule by the secretary without objection, was a waiver of all omissions in the poof. The testimony of appellee, as well as the secretary of the company, abundantly prove this fact, and it is not contradicted. The company could not, therefore, have been prejudiced, even if there were a biased juror. We think the verdict is eminently just, and affirm the judgment.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

In Error to the Circuit Court of the United States for the District of Minnesota.

THE REPUBLIC FIRE INS. CO., *Plaintiff in Error,*

vs.

CHARLES AND JOSEPH R. WEIDE.*

The Hanover Fire Ins. Co., Plff in Error, vs.
Charles and Joseph R. Weide.

The Germania Fire Ins. Co., Plff in Error, vs.
Charles and Joseph R. Weide.

The Niagara Fire Ins. Co., Plff in Error, vs.
Charles and Joseph R. Weide.

The plaintiffs, in the court below, introduced evidence to show that before the fire they had taken an inventory of their stock, which was reduced to writing by one of them, in an inventory book, and that the values were correctly footed up therein, and that, at the same time, these footings were correctly entered by one of the

* Decision rendered May 6th. 1872.

plaintiffs on the fly leaf of an exhausted ledger, and were afterwards transferred by one of the plaintiffs to the fly leaf of a new ledger. The plaintiffs offered in evidence the entry of the footings on the fly leaf of the new ledger. Both the inventory book and the exhausted ledger had been destroyed and neither of the plaintiffs could remember the amount of the footings. *Held*, that these entries were properly admitted by the court below.

The policies provided that the assured should, if required, submit to an examination under oath, and that until such examination the loss shall not be payable. It is to be understood that the examination relates to matters pertinent to the loss.

The plaintiffs, during the examination, declined to answer questions respecting the amounts for which they had made settlement with other companies. *Held*, that there was no sufficient foundation laid for an instruction that if the jury should believe the plaintiffs had, in the course of the examination, refused to answer any questions, by which the defendants could fairly estimate or reasonably infer the plaintiffs' real loss, the verdict must be for the defendants. There was no evidence of refusal to answer such questions.

A clause in the policy provided that the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and that until they were produced, the loss should not be payable. The bills of exception state that there was evidence that the plaintiffs were requested to produce duplicate bills. There was no evidence to show when the request was made, whether before the commencement of the actions or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. *Held*, that there was no error in refusing to instruct the jury that if they believed from the evidence that the plaintiffs were requested to produce duplicates of invoices, and neglected to do so before the commencement of the action, their right of action never accrued.

The policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss or in the examination to which the assured agreed to submit.

It does not invariably follow from the fact that there was a material discrepancy between the statements by the plaintiffs, under oath, in their proofs of loss, and when testifying at the trial, that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It is only fraudulent false swearing in furnishing the preliminary proofs that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent.

Mr. Justice Strong delivered the opinion of the court.

These causes were tried together before one jury, and they present the same questions. They were actions upon policies of insurance against fire, in which it became material to prove what was the quantity and value of the goods the plaintiffs had when the fire occurred. As bearing upon this, evidence was introduced, without objection, tending to show that the plaintiffs took a correct inventory of their stock on the 28th of February, 1866, which was correctly reduced to writing by one of them in an inventory book; that the prices or values were correctly footed up therein; that at the same time the footings were correctly entered by one of the plaintiffs upon the fly leaf of an exhausted ledger, and afterwards transferred also by one of the plaintiffs to the fly leaf of a new ledger; that neither of the plaintiffs could remember the amount of such inventory or footings, and that both the inventory book and the exhausted ledger had been destroyed. The plaintiffs then offered the entry of the footings upon the fly leaf of the new ledger, which the court received, and in this it was contend-

ed there was error. It will be observed that the footings upon the fly leaf of the ledger were not offered or received as independent evidence. They were accompanied by proof that they were correct statements of the values of the merchandise, and that they were correctly transcribed either from the inventory book or from the fly leaf of the exhausted ledger, both of which appear to have been originals. How far papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness, who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness. It is true a copy of a copy is not generally receivable, for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger of variance with every new transcription. For that reason, even a sworn copy of a copy is not admissible when the original can be produced. But in this case the inventory book and the fly leaf of the exhausted ledger had both been burned. There was no better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy. It does not appear whether they were taken from the inventory book or from the fly leaf of the old ledger. And it is of little importance, for as those entries were made at the same time, neither ought to be regarded as a copy of the other, but rather both should be considered originals. We do not, however, propose to discuss this exception at length, for we regard it as settled by the decision in *Insurance Company vs. Weide*, 9 Wall., 677, that the evidence, under the circumstances, was properly received.

The second and third exceptions are disposed of by what we have already said, and they are unsustained.

There is nothing also in the fourth exception. By the policies the assured, after furnishing proofs of loss, were bound, if required, to submit to an examination under oath, and it was stipulated that until such examination should be permitted, the loss should not be payable. Of course it is to be understood that the examination contemplated relates to matters pertinent to the loss. In these cases the plaintiffs did submit to an examination, but declined to answer questions re-

specting the amounts for which they had made settlements with other insuring companies. We are unable to perceive that the questions proposed had any legitimate bearing upon the inquiry, what was the actual loss sustained in consequence of the fire. If the plaintiffs had claims upon other insurers, and compromised with some of them for less than the sums insured, it is not a just inference that their claim against these insurers was exaggerated. A compromise proposed or accepted is not evidence of an admission of the amount of the debt. There was then no sufficient foundation laid for the instruction requested by the defendants, that if the jury should believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policies, refused to answer any questions by which the defendants could fairly estimate, or reasonably infer plaintiffs' real loss in the insured property, and had not before the commencement of the actions answered the questions under oath, the verdict must be for the defendants. There was no evidence of refusal to answer *such* questions.

The fifth exception is the refusal of the court to instruct the jury that if they believed from the evidence the plaintiffs were requested by the defendants to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of the actions, their right of action never accrued, and that the verdicts must be for defendants. The prayer for this instruction was founded on a clause in the policy that the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and exhibit the same for examination to any person named by the company, and that until the proofs, declarations, and certificates (stipulated for in case of loss) were produced, and examinations and appraisals permitted, the loss should not be payable. The bills of exception state that there was evidence tending to show that the plaintiffs were requested to produce duplicate bills of purchases, but there does not appear to have been any evidence when the request was made, whether before the commencement of the actions or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. Moreover, the request was for duplicates, and not for certified copies. We cannot, therefore, say there was error in refusing the instruction asked for.

Nor was there error in denying the defendants' third and fourth prayers. It is true the policies stipulated that fraud and false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the

submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath in the proofs of loss, and their statements when testifying at the trial, that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations, which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent.

The remaining two assignments of error are not pressed, and it is properly conceded that the court could not lay down as a rule of law the mode of computation designated in the prayers for instruction.

The judgment in each case is affirmed.

STATUTE LAWS.

MISSOURI.

AN ACT to amend an Act entitled "An Act for the incorporation and regulation of Life Assurance Companies," approved March 10, 1869, by adding a new section thereto.

Be it enacted by the General Assembly of the State of Missouri, as follows :

SECTION 1. The above entitled Act is hereby amended by adding thereto an additional section, number fifty-five, to read as follows :

Section 55. Any company, organized under the laws of this State, as a joint stock, or stock and mutual company, doing business as a life insurance company, may at any time increase its capital stock to any amount not exceeding one million dollars, with the consent of a majority in interest of the stockholders : such consent shall be certified to by the Secretary of the company, under oath, and shall state the names of the stockholders and the number of shares voted by each stockholder, and file the same in the office of the Superintendent of the Insurance Department.

SEC. 2. Any company that shall increase its capital stock, under the provisions of the first section of this Act, shall in all things comply with the provisions of an Act entitled "An Act for the incorporation and organization of Life Assurance Companies," approved March 10, 1869, its stock subscribed and secured as provided in sections nineteen, twenty and twenty-one of said Act : and nothing in this Act shall be so construed as to affect the duties of the Superintendent of the Insurance Department, as provided in section forty-one of said Act : and no company increasing its capital stock under the provisions of this Act, shall declare and divide, or pay a greater amount as a dividend or profit than ten per centum per annum on the amount of capital actually paid in, to its stockholders.

SEC. 3. This Act shall take effect and be in force immediately.

Approved March 30, 1872.

OHIO.

AN ACT to provide for establishing an Insurance Department in the State of Ohio.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That there is hereby established a separate and distinct department, to be known as the Insurance Department, which shall be charged with the execution of all laws now in force, or which shall hereafter be passed, in relation to insurance and insurance companies.

SEC. 2. That there shall be appointed by the governor, by and with the advice and consent of the senate, if in session, within thirty days after the passage of this act, a chief officer of said department, who shall be styled the Superintendent of Insurance, and shall hold his office for the term of three years, and until his successor is duly appointed and qualified, and shall receive for his services the sum of three thousand dollars per annum: Provided, however, that the person first appointed superintendent under this act shall enter upon the duties of his office on the first Monday of June, A. D. 1872. The person so appointed shall be an elector of this State, and shall, during his term of office, have no official connection with any insurance company, nor own or be interested in the business, bonds, stock, or other property of, or be employed by any such company, and shall be ineligible to or hold any other office during the term of his said office. In case of a vacancy in said office by death, resignation, removal, suspension, or otherwise, the governor shall fill the vacancy, and report the name of such appointee to the senate, if in session, and if not, within ten days after the commencement of the next regular or adjourned session thereafter; and such appointee, by and with the advice and consent of the senate, shall hold his office for the unexpired term, and until his successor is duly appointed and qualified. If at any time the governor shall become satisfied that the superintendent is inefficient, incompetent or derelict in the discharge of his duties, he is hereby authorized and required, by and with the advice and consent of the senate, if it be in session, to remove said superintendent from office, and if the senate be not in session, to suspend him from the discharge of his duties, temporarily filling the vacancy.

as hereinbefore provided, and reporting the fact to the senate at its next meeting thereafter, for its action thereon.

SEC. 3. Before entering upon the discharge of his duties, the said superintendent shall take an oath or affirmation to support the constitution of the United States, and the constitution of this State, and to faithfully and honestly discharge the duties of his said office, and that he is not an officer, employe or stock-holder in any insurance company, or otherwise interested therein, directly or indirectly, except as a policy-holder; and shall also give bond to the State of Ohio, in the sum of twenty thousand dollars, with not less than two sureties, to be approved by the governor, and filed and recorded with the secretary of State, conditioned for the faithful discharge of the duties of his office. The said Superintendent shall possess all the powers, perform all the duties, and be subject to all the obligations and requirements now invested in or appertaining to the auditor of State by the laws relating to insurance and insurance companies, and from the date of entering his office shall take the place of said auditor, under all the provisions of said laws, and have the sole and exclusive charge and control over said Insurance Department, under the laws relating thereto.

SEC. 4. Said superintendent may appoint a chief clerk, who shall in no way be interested in any insurance company, except as a policy-holder, whose appointment shall be evidenced by a certificate thereof, under the official seal of the superintendent, and who shall continue in office during the pleasure of the superintendent; and before entering upon his office shall take the oath of office hereinabove prescribed, and give bond with two or more sureties, in the sum of ten thousand dollars, to the acceptance of the superintendent, conditioned for the faithful performance of his official duties: and in case of the absence or inability of the superintendent, the said chief clerk shall act as his deputy, and shall possess the powers and perform the duties of the superintendent. The superintendent shall also have power to employ such other clerks, from time to time, as may be necessary to carry on the business of his office with promptness and accuracy; and whenever necessary for the examination into the business and affairs of any insurance company, may employ one or more skilled and competent persons to make such examination and report thereon. The superintendent shall be furnished with suitable rooms in the State house, which shall be furnished from time to time with the necessary office furniture, stationery, and other conveniences for the transaction of the business of his office; and all the salaries, payments and expenditures for

Insurance Department, authorized by this act, shall be paid out of the treasury, upon the certificate of the superintendent, in the same manner as other like expenses: Provided, the amount so paid out shall at no time exceed that collected from the insurance companies as provided for in this act.

SEC. 5. The seal of the Superintendent of Insurance shall be one inch and three-fourths in diameter, surrounded by the words "Superintendent of Insurance of Ohio," with the device prescribed for the seal of the auditor of State and other officers, by the act passed May 9, 1868, to be furnished by the secretary of State; and every certificate, assignment or conveyance executed by said superintendent in pursuance of any authority conferred by law, and sealed with his seal of office, shall be received as evidence, and may be recorded in the proper recording office in the same manner and with like effect as a deed regularly acknowledged before an officer authorized by law to take the acknowledgement of deeds; and all copies of papers in the office of said superintendent, certified by him and authenticated by the said seal, shall in all cases be evidence equally and in like manner as the original.

SEC. 6. All books and documents and all other papers whatever, in the office of the auditor of State, relating to insurance, shall, on demand, be delivered and transferred to the Superintendent of Insurance, who shall give to the said auditor of State a receipt for the same, which shall be to the auditor a full release from all responsibility in connection with such documents, etc.; and thereafter such books, papers and documents shall be and remain in the charge and keeping of the said superintendent in his said office.

SEC. 7. It shall be the duty of the Superintendent of Insurance, whenever he shall have good reason to suspect the correctness of any annual statement, or that the affairs of any company are in an unsound condition, to make, or cause to be made, an examination into the affairs of any such insurance company, for the purposes named in this act, incorporated in this State, or doing business by its agencies in this State; and it shall be the duty of the officers or agents of any insurance company doing business in this State, to cause their books to be opened, for the inspection of said superintendent, or the person or persons so appointed, and otherwise to facilitate such examination, so far as it may be in their power so to do.

SEC. 8. For that purpose, the superintendent, or the person or persons so appointed by him, shall have power to examine, under oath, which he or they are hereby empowered to administer, the officers

and agents of any company relative to the business of said company ; and whenever the superintendent shall deem it for the interest of the public, he shall publish the result of such investigation in some newspaper printed in Columbus, and of general circulation in the State, and in a newspaper printed in the county where the principal office of the company is located.

SEC. 9. Whenever it shall appear to the said superintendent, from such examination, that the assets of any life insurance company are insufficient to reinsure its outstanding risks as provided by this act, or that the net assets of any insurance company other than life, organized under the laws of this State, are reduced more than twenty per cent. below the capital stock required by this act, or by its charter, he shall require the officers thereof to direct the stockholders to pay in the amount of such deficiency, within such period as he may designate in such requisition, or in default thereof he shall communicate the fact to the attorney general, whose duty it shall then become to apply to the supreme court for an order requiring such company to show cause why the business of such company should not be closed, and the court shall thereupon proceed to hear the allegations and proofs of the respective parties. Any transfer of the stock of any company made during the pendency of any such investigation, shall not release the party making the transfer from his liability for losses which may have accrued previous to the transfer.

SEC. 10. If upon examination it shall appear to the superintendent that the assets of any company chartered on the plan of mutual insurance are insufficient to justify the continuance of such company in business, it shall be his duty to proceed, in relation to such company, in the same manner as is herein required in regard to joint stock companies ; and the trustees or directors of such company are hereby made personally liable for any losses which may be sustained upon risks taken after the Superintendent of Insurance shall have issued his requisition for filling up the deficiency in the assets, and before such deficiency shall have been made up.

SEC. 11. In case it shall appear to the satisfaction of said court, that the assets of said company are not sufficient, as aforesaid, or that the interests of the public so require, the said court shall decree a dissolution of said company and a distribution of its effects. The supreme court shall have power to refer the application of the attorney general to a referee, to inquire into and report upon the facts stated therein. After the superintendent shall have issued his requisition as aforesaid, it shall be unlawful for said company to issue any new pol-

icies of insurance, or to transact any new business, until the court shall have rendered its decision in the case, and until the Superintendent of Insurance shall have issued to such company a license, which shall be its authority to resume business.

SEC. 12. Whenever it shall appear to the Superintendent of Insurance, from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company, partnership or association, not organized under the laws of this State, are in an unsound condition, he shall revoke the authority granted to such company to do business in this State, and cause a notice thereof to be published in at least one newspaper published in the city of Columbus, and in the county where the general agency is located within this State, and after the publication of such notice, it shall not be lawful for the agents of such company to procure any new applications for insurance or to issue any new policies. The expenses of any examination made under this act shall be paid by the company examined.

SEC. 13. The Superintendent shall keep and preserve, in permanent form, a full record of his proceedings, including a concise statement of the condition of each company reported, visited or examined by him. The said superintendent shall annually, at the earliest practicable date after the returns are received from the several companies, make a report to the legislature of the general conduct and condition of the insurance companies doing business in this State, with such suggestions as he deems expedient, including also the information contained in the statements required of the said companies, and the result of the official valuations of life policies, to be arranged in tabular form, and prepare the same for printing in two separate reports, one pertaining to life insurance companies, and the other to all insurance companies other than life; three hundred copies of each of said reports shall be printed for the use of the general assembly; two thousand five hundred copies of each for the use of the superintendent, of which five hundred volumes containing both reports shall be bound in cloth. He shall also report the names and compensation of the clerks employed by him, the whole amount of income, the source whence derived, and the expenses in detail during the year ending upon the thirty-first day of the preceding December.

SEC. 14. It shall be the duty of the superintendent, annually, to make, or cause to be made, net valuations of all outstanding policies, additions thereto, unpaid dividends, and all other obligations of every life insurance company transacting business in this State; and for the purpose of such valuations, and for making special examinations of

the condition of life insurance companies, as provided in the laws of this State, relating to life insurance companies, and for valuing all policies of whatever description, and for any purpose whatever, the rate of interest shall be four per cent. per annum, and the rate of mortality shall be established by the tables known as the Actuaries' or Combined Experience Table: provided, that whenever the laws of any other State of the United States shall authorize a valuation of life insurance policies by some designated State officer, according to the standard herein provided, the valuation made according to the said standard, by such officer, of the policies and other obligations of any life insurance company not organized under the laws of this State, and certified by said officer, may be received as true and correct, and no further valuation of the same shall be required of such company by the Superintendent of Insurance.

SEC. 15. The superintendent shall annually, in September, furnish to the insurance companies doing business in this State, two or more printed copies of the forms of statements required by this act to be made by them, and he may make such changes from time to time, in the form of the same, and such additions thereto, as shall seem to him best adapted to elicit from said companies a true exhibit of their condition.

SEC. 16. All securities deposited with the Superintendent of Insurance, pursuant to the provisions of any law of this State, shall be deposited by said Superintendent of Insurance with the treasurer of the State, who, with his sureties, shall be responsible for the safe keeping thereof; and said treasurer shall only deliver such securities, or coupons attached thereto, upon the written order of the Superintendent of Insurance, and upon the warrant of the auditor of State.

SEC. 17. There shall be paid by every insurance company doing business in this State, to the Superintendent of Insurance, the following fees, to-wit: For the filing and examination of the first application of any company, and issuing the license thereupon, the sum of twenty-five dollars: for filing the annual statement required, twenty dollars; for each certificate of authority, or license, and certified copy thereof, two dollars; for every copy of a paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of office, and certifying any paper, one dollar: Provided that any company may pay to said superintendent the sum of two hundred and fifty dollars for licenses to its agents for the year, and by so doing shall be entitled, without further charge, to licenses for as many agents as it may choose to appoint. There shall be paid, also, by every life insurance

company doing business in this State, annually, by way of compensation for the valuation of its policies, in case no certified valuation of the same has been furnished to the Superintendent of Insurance, as provided in section fourteen of this act, one cent on every thousand dollars insured by it on lives, all of which fees shall be paid by the superintendent into the State treasury. When, by the laws of any other State or nation, any taxes, fines, penalties, license fees, deposits of money or of securities, or other obligation or prohibitions are imposed on insurance companies of this State, doing business in such State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions of whatever kind, shall be imposed upon all insurance companies of such other State or nation, doing business within this State, and upon their agents here.

SEC. 18. It shall be unlawful for any person, company or corporation in this State, either to procure, receive or forward applications for insurance in any company or companies not organized under the laws of this State, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the Superintendent of Insurance, in conformity to the provisions of this act.

SEC. 19. It shall be the duty of every insurance company doing business in this State to publish, at least once a year, in some newspaper of general circulation, in every county where such company has an agent, a certificate from the Superintendent of Insurance that such company has, in all respects, complied with the laws of the State relating to insurance. Said certificate shall also contain a statement, under the oath of the president or secretary of such insurance company, of the actual amount of paid up capital, the aggregate amount of assets and liabilities, together with the aggregate income and expenditures of such company for the year preceding the date of such certificate, a copy of which certificate shall be filed in the office of the recorder in each county in which the company has an agent. No other publication than as above provided for shall be required of such companies.

SEC. 20. Any insurance company not organized under the laws of this State may appoint one or more general agents in this State, by resolution of their board of directors or managers, with authority to appoint other agents of said company in this State, a certified copy of which resolutions shall be filed with the Superintendent of Insurance; and agents of such company, appointed by such general agent,

shall be held to be the agents of such company as fully, to all intents and purposes, as if they were appointed directly by the company. Agents for any such company in this State may be appointed by the president, vice-president, chief manager or secretary thereof, in writing, with or without the seal of the company, and when so appointed shall be held to be the agents of such company as fully as if appointed by the board of directors or managers in the most formal mode.

SEC. 21. Every county recorder shall be authorized to demand and receive for every paper filed in his office under this act the sum of ten cents.

SEC. 22. When any life insurance company, transacting the business of insurance within the State of Ohio, shall desire to discontinue its business, the superintendent shall, upon application of such company, or association, give notice of such intention in a paper published and having general circulation in the county in which said company or its general agency is located, at least once a week for six weeks, the expenses of publication to be paid by such company. After such publication said superintendent shall deliver up to such company, or association, the securities held by him belonging to them, on being satisfied, by the exhibition of the books and papers of such company, or association, and on examination, to be made by himself, or some competent disinterested person or persons, to be appointed by him, and upon the oath of the president or principal officer, and the secretary or actuary of the same, that all debts and liabilities of every kind are paid and extinguished, that are due or may become due, upon any contract or agreement made with any citizen or resident of the United States. And the said superintendent may, also, from time to time, deliver up to such company, or association, or its assigns, any portion of said securities, on being satisfied that an equal proportion of the debts and liabilities of every kind that are due, or may become due, upon any contract or agreement made with any citizen or resident of the United States by said company, or association, has been satisfied: Provided, the amount of securities retained by him shall not be less than twice the amount of remaining liabilities.

SEC. 23. All the provisions of this act relating to insurance companies organized under the laws of any other States of the United States, shall apply to any company organized under the laws of the United States, for any of the purposes specified in this act; and all the provisions of this act relating to agents of companies organized under the laws of any State, shall apply to the agents of such compa-

nies, organized under the laws of the United States; and any violation of the provisions of this act by any person, or agent, in the employment of any such company, organized under the laws of the United States, shall subject the offender to the same penalties provided by this act for any violation of its provisions by persons acting for similar companies, organized under the laws of any other State of the United States.

SEC. 24. Every person who shall knowingly and willfully violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall be liable to prosecution therefor, as in cases of other misdemeanors, and on conviction thereof shall be fined in any sum not exceeding five hundred dollars. And any corporation, or any officer or agent thereof, willfully violating any of the provisions of this act, shall be liable to prosecution, and on conviction thereof shall be fined in any sum not exceeding one thousand dollars; which fines shall, when collected, be paid into the treasury of the proper county, for the benefit of the common school fund; and, moreover, such person or corporation shall be liable in damages to the party injured by reason of such violations.

SEC. 25. The provisions of this act shall apply to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance. It shall be unlawful for any company, corporation, or association, whether organized in this State or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this State, without first having complied with all the provisions of this act.

Passed March 12, 1872.

OHIO.

AN ACT to regulate Insurance Companies doing an insurance business in the State of Ohio.

CHAPTER I.

INSURANCE OTHER THAN LIFE.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That hereafter when any number of persons, as required by the first section of the act entitled "An act to provide for the creation

and regulation of incorporated companies in the State of Ohio," passed May 1, 1852, and the acts amendatory thereto, shall associate to form an insurance company for any other purpose than life insurance, they shall, under their hands and seals, make a certificate specifying the name assumed by such company and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company shall be located; which certificate shall be acknowledged, certified and forwarded to the secretary of State, who shall submit the same to the attorney general for examination, and if found by him to be in accordance with the provisions of this act, and not inconsistent with the constitution and laws of this State and of the United States, he shall certify the same and deliver it back to the said secretary, who shall have the right to reject any name or title of any company applied for, when he shall deem the same similar to one already appropriated, or likely to mislead the public.

SEC. 2. Upon the approval of said certificate by the attorney general and the secretary of State, the said secretary of State shall cause it to be recorded and copied in the same manner as is provided in the second section of said act, and a copy thereof deposited with the Superintendent of Insurance. And said persons, when incorporated, and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance, as named in such certificate of incorporation, and by the name and style provided therein, shall be deemed a body corporate, with succession; they and their associates, successors and assigns, shall have the same general corporate powers, and be subject to all the obligations and restrictions of said act, and of the acts amendatory and supplementary thereto, except as herein provided.

SEC. 3. No joint stock company shall be incorporated under this chapter with a less capital than two hundred thousand dollars, which stock shall be divided into shares of one hundred dollars each. No mutual fire insurance company not of this State shall do business therein.

SEC. 4. The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they shall deem convenient and proper, and shall keep the same open until the full amount specified in the certificate is subscribed.

SEC. 5. The affairs of any company organized under this chapter shall be managed by not more than twenty-one nor less than five di-

rectors, all of whom shall be stockholders. Within one month after the subscription books shall have been filled, a majority of the subscribers shall hold a meeting for the election of directors, each share entitling the holder to one vote; and the directors then elected shall continue in office until such time in the month of January thereafter, as the by-laws of the company shall direct, and until others shall have been elected and duly qualified to succeed them in the trust.

SEC. 6. It shall be unlawful for any insurance company organized under this chapter, or incorporated under any law of this State for the purposes provided in the first section of this chapter, to invest its capital, or any part thereof, otherwise than in bonds and mortgages on unincumbered real estate within the State of Ohio. worth double the sum loaned thereon, exclusive of buildings, or in stocks of this State, or stocks or treasury notes of the United States. But any funds accumulated in the course of business, or surplus money over and above the capital stock of any insurance company, may be loaned on, or invested in the above named securities, or in bonds and mortgages on unincumbered real estate worth fifty per cent. more than the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some insurance company authorized to do business in this State, and the policy transferred to said company, the stock and bonds of any county, or incorporated city or village in this State authorized to be issued by the legislature, or the stocks and bonds of any State, or the stocks, bonds, or other evidences of indebtedness of any solvent dividend paying institution incorporated under the laws of this, or any other State, or of the United States, except their own stock; provided, always, that the current market value of all such stocks, bonds, or other evidences of indebtedness, except the stocks and bonds of this State and the United States, shall be at all times, during the continuance of such loans, at least twenty per cent. more than the sum loaned thereon.

SEC. 7. Upon receiving notification that the proceedings required by the sections foregoing have been had, the Superintendent of Insurance shall cause an examination to be made, either by himself or some disinterested person, specially appointed by him for that purpose, who shall certify under oath that the capital herein required of the company named, has been paid in and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the sixth section of this chapter; and the corporators or officers of such company, shall be required to certify, under oath, that the capital exhibited is bona fide the property of the company. Such certificates shall be filed in the office of

the said superintendent, who shall thereupon deliver to such company a certified copy of said certificates, which, on being placed on record in the office of the recorder of the county where the company is to be located, in a book provided for that purpose by him, shall be their authority to commence business and issue policies; and such certified copy of said certificates may be used in evidence for or against said company, with the same effect as the original.

SEC. 8. It shall be lawful for any company organized under this chapter—*First*, to insure houses, buildings, and all other kinds of property, against loss or damage by fire, in and out of the State; and to make all kinds of insurance on goods, merchandise and other property in the course of transportation, whether on land or water, or on any vessel or boat wherever the same may be. *Second*, to make insurance on the health of individuals, and against personal injury, disablement or death, resulting from traveling, or general accidents by land or water. *Third*, to insure the fidelity of persons holding places of public or private trust. *Fourth*, to receive on deposit and insure the safe keeping of books, papers, moneys, stocks, bonds, and all kinds of personal property; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property by means of any loan or loans which it may have made on mortgage, bottomry or respondentia, and generally to do and perform all other matters and things proper to promote these objects: Provided, that no company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this chapter, or transacting business in this State, shall expose itself to loss, on any one risk or hazard, either by one or more policies, to an amount exceeding five per cent. on its paid up capital, whether re-insured or not; provided that the restriction as to amount of risk any company shall assume, shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys, and other personal property.

[Concluded in July Number.]

MISCELLANEOUS DEPARTMENT.

THE LIFE ASSOCIATION—INVESTIGATION BY THE NEW YORK BOARD.

We reluctantly devote a large space in this number to the report of a committee appointed to investigate the financial condition of the Life Association of America, and the integrity of its management. The report is given in full, as it appeared in the *Missouri Republican*, with the accompanying report of the actuaries, and Mr. Wright's explanation, and also the letter or circular of Mr. Britton, the president, to the trustees and policy-holders of the Association. Altogether, they constitute a remarkable series of papers. Their importance and character is such that they cannot well be abridged. We doubt whether there has been, for years, so important a disclosure, as is therein contained, of the affairs of any life insurance company in this country, or one that more conclusively shows the abuses that may exist in a company claiming the first rank for reliability and success. For some reason, the public has not been kept so well informed in regard to the character and history of the Life Association as they should have been.

It is not to be understood that this is an investigation from which the public were to expect the complete or impartial truth. Like its several predecessors, the examination emanates from the company itself. Whether, like the others, it was contrived at the home office, for the manufacture of moral capital and public confidence, or originated with the New York Board, is of little consequence to the public. The object of all concerned is to make out a favorable case for the outside world, as is abundantly shown by the course of the investigation, and the style and logic of the report. The gentlemen, however, comprising the committee, had too much honor and honesty to indorse the representations of the officers and managers of the Association, or the reports of the former so-called examinations. Hence, some facts have been developed which the public will be interested to know.

This committee claims to have made a very thorough investigation

into the financial condition of the Association, and the charges which had been made against the company. Some of these charges, like those relating to the investment policies; its lien plan; the incompetency and mismanagement of its officers and directors, and the extravagance of its expenditures, &c., &c., have been noticed in their report. Others they have in a general way ignored, or have simply stated that they had no reason to doubt that everything is all right. For example, in regard to that most important feature of its charter and management, which relates to its investments, and which has caused as great distrust, among those most familiar with the operations of the company, as any other of its peculiarities, the committee say: "It was not possible to determine the character and value of all the securities held by the company, particularly the value of the real estate, on which loans have been made, as the charter of the company contemplates that the loans shall be made, to some extent, in the localities where premiums have been paid, and it would, therefore have been a work of great time and expense, to visit those localities in order to fix the value of property on which mortgages are held. While the committee are not, therefore, prepared to express an opinion on that class of securities, they have no reason to doubt that they are generally of a good character." This conclusion is formed in the face of such revelations of mismanagement as they describe in places where they were able to complete their investigations. The committee do not state the fact, that, while our best managed companies consider it of the greatest importance that the securing of business should not be permitted to influence the investment of funds, the association makes its local investments one of the most efficient means of securing its great amount of business.

One of the results of this investigation, as stated in the report, is the discovery that two other of the association's peculiar features, instead of possessing the merits that have been claimed for them, are delusive and worthless. The committee say of the "Investment Endowment" policies that they partake so little of the character of an insurance policy that they should be called "contracts"; that they are simply agreements, on the part of the company, to return to the holders the amount received, with the average rate of interest the company receives from its investments, together with a *pro rata* proportion of the miscellaneous profits of the institution.

The "Low Cash Lien Plan" they characterize as a "worthless device," and declare that the liens are not valid assets. They recommend that the contract giving the "alleged inventor" of the plan 25

per cent. of the savings, and a life annuity of \$1,500, be at once cancelled. The report also shows that the estimate of the association's assets, as given in their returns and published statements, must be reduced more than \$262,000 on account of the false valuations of these Endowment and Lien policies. This amount is reached, even by the peculiar reckoning of the actuaries employed. We have reason to believe that the first report of the actuaries to the committee made a fairer but a much worse showing for the association, than the last and published one, and that the truth would show, not only the absence of any surplus, but an impairment of the reserves.

Although these actuaries were under no direct obligations other than to the committee and the association, yet surprise will be felt that gentlemen of their character and standing should have suffered themselves to be compromised, to any extent, in a report likely to be used in appealing to and influencing the opinions and sentiments of the public. Professional reputation, and the statements of scientific investigation should be sacred as truth itself. Mr. Wright, it is true, by his explanation, attempts to relieve himself of the responsibility of joining in the report, and by his cheerful concession to the solution of his associates, obtained by "treating the liens as so much cash, which they are not," shows the amiability of his nature. Yet a more open and direct statement of his conclusions would have been more consistent with his character and reputation.

It will seem to the readers of the report that the directors of the association cannot have exercised any intelligent or faithful direction in its management, and that they should be held to their full share of responsibility for the present condition of its affairs. On them devolves the responsibility of watching over the interests of those who have entrusted to this company their savings—often hard-earned—as a sacred fund for their widows and orphan children. The weight of their names have been invoked and given upon all occasions to break the force of charges made against the management of the company, and to lend moral character to the institution, and its projects. But while the committee characterize the conduct of the officers and actuaries in language deservedly severe, it is singular to observe their attempt to shield the directors from all blame.

In conclusion, as the result of their investigation, after stating that in the future conduct of the company the errors of the past must be avoided; that some important changes must be made in its organization; that modifications are needed in its charter, in regard to the manner of making its loans; that hereafter competent actuarial assis-

tance must be secured, that the directors "may not be in the future, as they have been in the past, misled by delusive statements into the adoption of doubtful modes of insurance"; that the company has suffered from the beginning for want of the services of an experienced and efficient head officer; that if the association is to be carried on without a thoroughly capable head at St. Louis, it cannot succeed, and that they would not be prepared to advise the New York Board to "lend their character and influence to sustain the institution without proper assurances from the home board that the suggestions in their report should be carried out to their fullest extent," the committee beg leave to recommend the passage of a preamble and resolution, in which they say that, whereas, by the report of the actuaries, appointed by the board, the Life Association of America "has attained its present position with unusual rapidity," (!) and is in a sound condition, and, whereas, by the report of the committee, the securities appear to be substantial, and the charges made against the association essentially baseless, (!) and whereas, the executive committee at St. Louis have given their assurance to said committee, "that the business of said association shall be conducted with the greatest possible economy and conservatism, and that they will perfect a thorough and efficient organization thereof," therefore, resolved, "that the best wishes and efforts of this board shall be given for the good of the institution, and for the extension of its usefulness," which preamble and resolution were unanimously adopted by the board of directors.

Of course the effect produced by this remarkable report upon the managers at the home office, is a matter of importance and of interest to the public. Is the assurance given to the New York Board by the executive committee at St. Louis, made in sincerity, and will it be carried out in good faith? The remarkable and characteristic circular from the president, by order of the executive committee, shows something of the feelings and intentions of the officers and of that committee, and the spirit at the home office. Instead of acknowledging their mistakes and faults, with the assurance of improvement and reform in the future, and that display of penitence and humility so eminently appropriate to the occasion, the circular begins with the old and hackneyed story about "a success never before known in the history of life insurance," and "the many calumnies by which the institution has been assailed." It is like a woman with a character no longer doubtful by her own showing, and convicted by her own witnesses, attempting to brave the public gaze by crying out that she is the victim of slander and jealousy. We condemn her taste, to say nothing

of her judgment. The incorrect representations in regard to the surrender of the Investment policies; the weak and partial attempt to justify the valuation of the Lien policies, and the testy manner in which the recommendation of the committee "that certain changes be made in the charter and organization of the association," is alluded to, show the chagrin and disappointment caused by the report, while the remark that the recommendation of the committee shall have "due consideration," indicates that there is something the matter with the assurance received by the New York committee.

PROXY VOTING.

The object of the proxy is to enable the several members of a corporation who, for any cause, can not be present at the election of officers, to give their voice in such election, by representation. The intention is good, and may in some cases prove a safeguard to the proper management of the company's affairs. It evidently creates a certain degree of direct responsibility of the managers to the membership, who hold, by means of it, power to prevent the re-election of men who are guilty of gross maladministration. But in practice it usually works a different result. Proxies are procurable on a large scale only by the officers of the company, through the agents, with whom they are in constant correspondence, and who have peculiar facilities for collecting them without trouble and expense to themselves. The course pursued in such cases is this: At a suitable time prior to the occurring of an election, letters go out from the home office to the several territorial agents, urging them by themselves and their sub-agents to procure and forward blank proxies from all the policy-holders within their range, or as many as possible, on or before a given date. The instruction is of course complied with by the agents, for there is a single interest between the agents and the officers, and in due time thousands of blank proxies flow in to the home office, where the blanks are filled with the names of persons who are known to be favorable to the re-election of the incumbents, and thus the proxy, which is intended to diffuse power, is converted into a means of centralizing it in the hands of those who desire to perpetuate the offices and the emoluments of office among themselves. If a local disturbance threatens to displace them, the remedy is at hand. Thousands of these votes are ready to be filled up on demand and as the exigency may require, and thereby the complainants are made powerless by a few men, who are on the instant converted into an army of voters. There is one

company in Missouri whose charter does not allow any one member to cast over one hundred proxies. In this company the officers are accustomed to gather in thousands of blanks, prior to an election, to cast one hundred each in their own interest, and to distribute the remainder among their friends, in parcels of one hundred each, so that the proxy is, in fact, the strongest muniment of the persons who are in power. We also are acquainted with another company in which the secretary and general agent for a series of years cast nearly all the proxies, and thereby controlled the election at pleasure.

It may be beyond the power of legislatures to correct this abuse effectually, but the State of Massachusetts has taken the initiative by the passage of an act entitled "An act to change the method of voting in mutual fire insurance companies," which provides that "No paid officer or agent shall ask for, receive, procure to be obtained, or use any proxy vote in the corporation with which he is connected. Any officer or agent who violates the provisions of this act, shall forfeit and pay a fine of not less than one hundred dollars nor more than three hundred dollars."

If a similar law has been enacted, imposing the same restraint upon the use of the proxy by the officers and agents of mutual life insurance companies, it has not come to our knowledge; but it is evidently no less needed in the life department than in that of fire.

The passage of the above act is significant of a popular movement in favor of the purity of elections in the interest of the people, as against the tendencies to centralization and monopoly which exist in all monied institutions, even though mutual in their organization.

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CASES REPORTED.

The present number contains a full report of the decisions in nine insurance cases.

In *O'Connor vs. The Hartford Fire Ins. Co.*, several interesting questions arise in regard to the power and authority of the wife to act in the absence of her husband. The court holds that she has authority, in the absence of her husband, without express delegation of power from him, to make proofs of loss, and do other necessary acts, and that she is competent as a witness to testify to such facts alone within her knowledge. The decision was rendered by the Supreme Court of Wisconsin. The court also hold that the company is bound to state to the insured the grounds of refusal, where it declines to receive the proofs and pay the loss. In this connection, the judge re-

marks: "We cannot think that the law will permit, much less encourage, the company in objecting to the form of the proofs, without at the same time informing the assured what the objections are. In this instance we are glad to say that the obligations of the law and the obligations of private or individual courtesy, and the civilities of ordinary business intercourse, as recognized among well-bred people, exactly coincide."

For the decision in the case of *Reed et al. in the Matter of the Independent Ins. Co.*, rendered in the United States Circuit Court, we are indebted to the report of Hon. Julius L. Clarke, Insurance Commissioner of Massachusetts. He says the case possessed unusual interest as being the first one in that State involving the question of jurisdiction between the United States and the State courts in winding up the affairs of an insolvent company. Judge Shepley holds that the bankrupt act applies to insurance companies; that the State laws on the subject of bankruptcy must yield to the law of Congress on the same subject; that the decree of the State court that the company "be and the same is hereby dissolved," only so far dissolves it as, under the language of the statutes, is needful to suspend, restrain or prohibit the further continuance of the business of the company, and that the corporation still exists for the purpose of being proceeded against in bankruptcy, and that the receivers, under the State law have no power to act in winding up the affairs of the company.

In *Shaw et al. vs. The Aetna Ins. Co.*, the Supreme Court of Missouri held that where the consignees were instructed to insure by their consignors, they had a right to insure in their own names, as a convenient mode of indemnifying themselves against such damages as they might suffer in not insuring in the names of their principals, and that to this end they ought to be considered as interested to the full value of the property.

The case of *Miller vs. The Mutual Benefit Life Ins. Co.*, from the Supreme Court of Iowa, is of interest mainly as being the case in which a very important opinion was rendered by the same court on a former occasion, as reported in this journal, p. 25. The present defense was that the assured died from the use of intoxicating liquors. The judgment of the court below was reversed on the ground that there was error in overruling the defendant's motion for a new trial for the reason that the verdict was contrary to the evidence.

Judge Dillon, in rendering the opinion in the United States Circuit Court, in *Scott et al. vs. The Home Ins. Co.*, held that where the charge of willful burning is set up by the company as a defense, the rule of evi-

dence in civil cases applies, and that the evidence, to justify a verdict for the defendant, need not be such as to exclude all doubt. The judge states that the decided cases on this point are conflicting. In *Schultz vs. The Pacific Ins. Co.*, reported in this journal, p. 495, the Supreme Court of Florida held, where the defense was that the insured designedly cast away and destroyed his vessel, that the jury must be satisfied beyond a reasonable doubt.

The Aurora Fire Ins. Co. vs. Eddy, before the Supreme Court of Illinois, involved a number of interesting questions as to the effect of the conditions in the policy, and the power of an agent to give a construction to the written portion of the policy. It was held under a stipulation of the policy, requiring the assured to keep a certain number of buckets filled with water, ready for use at all times in case of fire, that if from freezing or other unavoidable causes, a literal compliance should become impossible, the assured was only required to keep the buckets in good and serviceable condition, ready for use. The insurance was upon a "flax factory," and at the time the risk was taken, the agent told the insured that the term "flax factory" was broad enough to embrace rope machinery. It was held that the agent was empowered to give this construction to the expression, and to bind the company.

In *The Reaper City Ins. Co. vs. Jones*, the Supreme Court of Illinois held that the company is chargeable with the act of the agent in giving permission to keep gunpowder upon the premises. The judge remarks that many of the conditions inserted in policies and printed in the smallest type, so as to be read with great difficulty, are but traps when the attention is not called to them.

In *Winnesheik Ins. Co. vs. Schueller*, the main point of the defense was, a failure on the part of the assured to render proper proofs of loss within the thirty days provided by the policy. The court held that good faith required the company to apprise the insured of any objections to the proofs, before she lost her right to supply defects and omissions. This decision was rendered in the Supreme Court of Illinois.

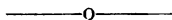
The opinion in *Insurance Companies vs. Weide et al.*, was rendered in the United States Supreme Court, and applies to four cases in which the same parties are defendants in error, and the same issues are raised. The most important questions relate to the admission in evidence of a memorandum of the amount of an inventory, and the effects of false swearing in working a forfeiture of claims under the policy.

INSURANCE LEGISLATION.

Maryland.—We are compelled by want of space, to defer the abstract of the act published last month till next number.

Missouri.—This act simply gives any stock or stock and mutual life insurance company of the State, the power to increase its capital stock to an amount not exceeding one million dollars.

Ohio.—One act and part of another is given in this number. The first establishes an Insurance Department, and the second is for the regulation of insurance companies, doing business in the State. An abstract of these acts will appear in next number.



BOOKS RECEIVED.

THE STATUTES OF ILLINOIS. Second volume. Containing the acts of 1871 and 1872. Authenticated by official certificate. Published by E. L. & W. L. Gross, Springfield. Price, \$5, in full law binding. Royal octavo, pp. 573.

The first volume of this work contains all the general laws in force up to and including 1869, grouped under appropriate titles, which are arranged in alphabetical order. The second volume contains the constitution of 1870, and the general laws passed subsequently. The superior typographical execution of this work is worthy of notice. The notes by the editors will be valuable aid to the profession.

INSURANCE REPORT.—Fourth Annual Insurance Report of the Auditor of Public Accounts of the State of Illinois. Part I. 1872. C. E. Lippincott, Auditor.

INSURANCE REPORT OF ILLINOIS.—The above report, Part I, relates to fire. From the numerous statistical tables contained in it, we glean the following instructive results: In 1869, the 109 companies that did business in the State, lost \$54 on every \$100 of premiums received in that year. In 1870, the 108 companies that did business in the State, lost \$80 on every \$100 of premiums received. In 1871, the

65 companies doing business in the State lost \$767 on every \$100 of premiums received. The average for the three years shows the loss of \$253 on every \$100 of premium receipts. This large deficit is owing, partly to the reduction of premiums resulting from rival interests, but mainly from the Chicago fire of October last. By two different methods of calculation, the Auditor, C. E. Lippincott, estimates the total destruction of property of all kinds by this fire, to have been \$153,000,000 to \$165,000,000. Deducting the amount reimbursed by the insurance companies, about \$51,000,000, the absolute loss to the Chicago property owners, was considerably over \$100,000,000.

The Auditor, in noting the failure of the movements made during the recent session of the legislature to erect a State Department of Insurance in Illinois, takes the ground that the existing insurance laws, with some amendments, which he promises to suggest to the next legislature, are sufficient for public security, and that the departments for special interests of any and every kind are unwise. He declares himself fully and decidedly on the subject, and with somewhat of patriarchal air, in the following language:

"My interest in the welfare of the people induces me to say that of all the mistakes committed by State legislatures in this country, the creation of exclusive de-

partments for the sole supervision of insurance business, is the greatest. And until I see the regular Departments overburdened with a multiplicity of business, I trust as a citizen of this State, to see no new departments; and very especially do I hope that when such creation becomes necessary, it may be general, and not for governing any one special private business interest, such as that of insurance."

The report is very full on all important points touching fire insurance, and shows evidence of industry and ability.

MISCELLANEOUS.

LIFE ASSOCIATION REPORT.

To the Board of Directors of the New York Department of the Life Association of America:

The undersigned committee, appointed with instructions to make an examination into the financial condition and the integrity of the management of the Life Association, with power to employ such actuarial assistance as may be necessary to aid them in the discharge of their duty, beg leave respectfully to report:

That under the authority conferred, Professor Elizur Wright and Messrs. E. W. Bryant and Sheppard Homans were engaged as actuaries to assist them in the performance of their duty. Promptly upon the appointment of the committee, (the third member thereof having stated his inability to accompany them), the undersigned, together with the actuaries, proceeded to St. Louis, and made such an examination as was contemplated by their appointment. Upon the actuaries devolved the duty of the examinations and calculations necessary to determine the correctness of the financial statement of the company, and as its last annual report was made up to the first of January last, the actuaries took that date as the basis of their examination, and made all their calculations with reference to the company's condition at that time.

The labors of the committee and of the actuaries were supposed to be substantially closed on the 15th of April last,

when a report was made by the actuaries to your committee.

The officers of the company, then, however, claimed that they had discovered errors in the data of policies, as furnished by them to the actuaries, the correction of which would materially change the result and make a more favorable report, and the delay which has occurred arose from the time consumed in making further examination required to correct these errors. The revised and official report of the actuaries is dated May 28, and is appended herewith. They find the net assets of the company on the first of January to have been \$3,511,207.51. Policy liabilities or net premiums reserved, \$3,406,577.93, showing a surplus on that date of \$104,629.58. By the company's published statement of their condition on that day a surplus is shown of \$366,637.45. This large discrepancy, \$262,007.87, is accounted for by errors in valuation made by the company's actuaries. The language of Messrs. Bryant, Wright and Homans in their report on this point is as follows:

"The difference between the reserve first above shown and that stated in the published annual statement of the association, is caused by the increased reserve given in the present valuation of two classes of policies: First, those known as 'Investment Endowments,' for which the reserve should be, as we have made it, equivalent to the sums insured instead of the ordinary reserve for single premium endowment insurance. Second, the lien policies, which in the association valuation were treated as calling for a reserve by the tables for equal annual premiums."

We have been at some considerable pains to trace the responsibility for these errors, and deem it proper to state that the directors should not be held responsible for them. The error in the valuation of the "Investment Endowment" policies is a very gross one. These policies, or contracts, as they may more properly be called, for they partake very little of the character of an insurance policy, are simply an agreement on the part of the company to return to the holders of the contracts, the amount received from them, together with annual interest. The

amount of the interest, it is true, is not specified, but the agreement is that it shall be the average rate of interest the company receives from its investments, together with the pro rata proportion of the miscellaneous profits of the institution.—It is unnecessary to state the reasons given for the issue of these policies. The board could not have understood their true character, and the responsibility for their issue, as well as for subsequent misvaluations, belongs properly to the officers who mislead them. It has been suggested that these investment endowment policies should be retired. We are informed that the holders will not object to cancel them on receiving the return of their original loan, but whether this is done or not we consider immaterial, as while they cannot be a source of profit to the company, it is equally certain that, by the terms of the contract, the company cannot be a loser by their continuance. But it is highly necessary that the liability under them should be correctly stated hereafter.

With regard to the low cash lien plan, the directors, being led to believe that its adoption would be of benefit to the company, entered into a contract for the right of its exclusive use, by which contract the alleged inventor of the plan was to receive 25 per cent. of the savings in commissions on the liens, (none being paid to agents thereon) and in addition to that a life annuity of \$1,500. The payments under the contract up to the present time are something less than \$6,000. The undersigned recommend the directors at once to cancel this contract and the annuity as well, on the ground that it is a worthless device and that the liens are not valid assets.

Every facility was afforded your committee by the directors of the company, who evidently desired that the investigation should be complete and thorough.—So many adverse criticisms had been made, and so many severe charges promulgated against the company, that the home board wished this investigation to be so thorough as to effectually exhibit the condition of the company, to leave no question unanswered, no facts undeveloped, and no necessity for further inquiry.

An examination of the life assets and

liabilities of the company was made by the actuaries as mentioned above. Mr. Coghill gave his attention to the securities for money loaned, and the other member of the committee, Mr. Savage, made investigations touching the general conduct of the institution, and matters affecting the economy and efficiency of its management.

Your committee thoroughly probed the charges which had been made against the institution, particularly those contained in the bill of complaint of Mr. David R. Boogher, and they think themselves justified in saying that no important matter has been overlooked; that every subject inquired into has been thoroughly examined, and the conclusions which they have arrived at are the result of their deliberate and best judgment. It was not possible to determine the character and value of all the securities held by the company, particularly the value of the real estate on which loans have been made, as the charter of the company contemplates that loans shall be made to some extent in the localities where premiums have been paid, and it would, therefore, have been a work of great time and expense to visit these localities in order to fix the value of the property on which mortgages are held. While the committee are not, therefore, prepared to express an opinion on that class of securities, they have no reason to doubt that they are generally of a good character.

The committee know that the executive committee of the company is composed of excellent men, who are well qualified for the discharge of the duty, and that they have performed their trust as custodians and investors of the company's money, in the most conscientious manner.

This company is no exception to the general rule that, during the earlier years of a life insurance company's history, the building up of its business is attended with great expense; and if your committee had been less familiar with the necessity of heavy expenses in such cases, they might have criticised the management in this respect more severely than they feel, under the circumstances, justified in doing. They think that the institution has now

made such growth, and attained such position, that the expense of obtaining new business may be very considerably reduced. This view is concurred in by the directors; and your committee believe that they will endeavor, as far as lies in their power, to retrench the expenses incurred for these purposes.

The charges affecting adversely the company's management are mainly those made by Mr. David R. Boogher, and contained in his bill of complaint. This document has been sent to every quarter where its circulation might be supposed to work injury to the institution. The manner in which it is drawn, and the mode of presentation of the alleged facts therein, bear strong evidence that it was not designed for a court of law so much as for the public, and the pains with which the charges have been promulgated through the newspapers and the mails, indicate that the expectation was not to obtain a verdict from the court, but to work injury to the company. All the facts therein stated, and all the allegations made, your committee have very thoroughly examined, and most of them deserve no comment, as their importance will not justify the time necessary to their discussion.

Mr. Boogher makes his main point on the investment endowment policies.—The undersigned have above correctly stated the character of these contracts, and their effect upon the company. The most that can be said respecting them is that their issue was injudicious, and that their misvaluation was a blunder by the actuary involving no responsibility, much less criminality, on the part of the board.

The result of this investigation shows that the company is at present in a sound condition, but in its future conduct the errors of the past must be avoided, and that some important changes should be made in its organization. In the local departments expenses may be retrenched without impairing the efficiency of the management.

Some modifications are desirable in the charter of the company: for while it is wise, and perhaps just, to make loans in the different departments in which the premiums are received, the directors or

their finance committee should be untrammelled by charter obligations, and be at liberty to make loans on such property and in such amounts as their judgment may dictate to be proper, without interference or control by the local directors, who are liable to regard the wants of their friends and localities as paramount to the interests of the company. But above all, your committee urge that hereafter competent actuarial assistance be secured as the advisers of the directors, that they may not be in the future, as they have been in the past, misled by delusive statements into the adoption of doubtful modes of insurance. The undersigned would not be prepared to advise the New York board to accept the trust of directors of this department, and to lend their character and influence to sustain this institution unless they had had proper assurances from the home board that the suggestions, which have been made in this report will be carried out to their fullest extent.—This being done, the committee believe that the Life Association, possessing as it does the foundation for a large and strong superstructure, may be made one of the most powerful and beneficent institutions in the land. If, however, it is to be carried on without a thoroughly capable head at St. Louis, it cannot succeed. It was apparent to the committee, through the whole course of their investigations, that the company has suffered from the beginning for want of the services of an experienced and efficient head officer. In saying this, we do not intend to reflect upon the able gentleman who fills the position of president of the association, for it is well known that his office has been little more than nominal, as other important interests have mainly claimed his attention. Every local board and *attache* of the company should be governed and directed by the president, who should himself be held strictly responsible for his management by the home board.—Having been assured that such changes as the proper prosecution of the business may require will be effected, your committee do not hesitate to accept the honorable position of Directors of the New York Department Board, and confidently

recommend the institution to the patronage of their friends everywhere.

Your committee beg leave to recommend the passage of the following preamble and resolution:

Whereas, by the report of Messrs. Elizur Wright, Sheppard Homans and Edwin W. Bryant, actuaries appointed under the action of this board, for the purpose of making a careful investigation into the affairs of the Life Association of America, it is shown, that not only has said association attained its present position with unusual rapidity, but that it is in a sound condition; and

Whereas, a committee appointed for that purpose by this board having visited St. Louis and examined into securities held by the association for moneys loaned, and also examined into the various charges made against said association, report that said securities appear to be substantial, and said charges essentially baseless, (all of which is fully set forth in said report); and.

Whereas, the executive committee of said association at St. Louis, composed of men of integrity and high business standing, have given their assurance to said committee that the business of said association shall be conducted with the greatest possible economy and conservatism, and that they will perfect a thorough and efficient organization thereof; therefore,

Resolved, That a copy of the report of said actuaries and of the committee be transmitted to the St. Louis board of directors of said association for such use as they may deem proper, and that the best wishes and efforts of this board shall be given for the good of the institution and for the extension of its usefulness.

[Signed.] GEO. W. SAVAGE,
J. H. COGHILL.

[The foregoing preamble and resolution were unanimously adopted by the Board of Directors.]

Hon. GEORGE W. SAVAGE, Chairman,
etc., New York:

The valuation of the liabilities of the Life Association of America, made under the direction of Prof. Elizur Wright, upon the corrected data of the policies, show the following results:

Gross receipts, Jan. 1, 1872,	\$3,597,003 49
Deduct for death and other	
matured claims, - - -	85,795 98
Net assets, - - -	3,511,207 51
Policy liabilities or net pre-	
mium reserve, - - -	3,457,780 43

Mr. Wright regards liens upon policies, as included wholly in the net premiums, as explained in his letter accompanying; but he concurs in considering the lien under the terms and obvious intent of the form of policy of the Life Association as constituting an integral part of the first year's premium, and that the proportions of net premium and margin are the same for the first as for each succeeding yearly premium.

The above stated reserve is computed on the assertion that four and a half per cent. annual interest will be realized upon all net premiums and reserves. The actual investments are made at a much higher current rate of interest; and it will be entirely proper and in conformity with the practice of many of the best companies to reserve at the current rate of interest for the unexpired part of the policy year, taking July 1, 1872, as the average day of expiring.

This difference in interest will

amount to - - -	\$ 51,211 50
And the reserves then stand at	3,406,577 93
Net assets (as above), -	3,511,207 51
Surplus - - -	\$ 104,629 58

And this we find and report to you as the true condition of the Life Association, Jan. 1, 1872. The reserve just stated with the net future premiums receivable with the current rate of interest to July 1, 1872, and with 4 1-2 per cent. interest thereafter, will fully provide, according to the American Experience Table of Mortality, for all the outstanding risks of the Association, Jan. 1, 1872.

The difference between the reserve first above shown, and that stated in the published Annual Statement of the Association, is caused by the increased reserve given in the present valuation of two classes of policies.

1st. Those known as investment endowments, for which the reserve should be, as we have made it, equal to the sum

insured, instead of the ordinary reserve for single premium endowment insurance.

2d. The "lien policies," which in the association's valuation were treated as calling for a reserve by the tables for equal annual premiums. As before said, we consider that the lien has the effect of giving a large first year's premiums, and we have valued the policies accordingly.

The gross or actual premiums receivable bear a margin or loading of \$531,430 per annum, for expenses and contingencies; after meeting which, the residue will be applicable towards returns of surplus, or "dividends," to the policy-holders. A considerable part of these margins will be saved hereafter, by the extinguishment, already effected, of a large amount of renewal commissions to agents. At the usual rate of 7 1-2 per cent., the amount annually payable for such commissions would be \$155,175. The amount actually payable does not exceed \$76,225. These margins amount to rather more than 25 per cent. of the actual premiums, and considerably exceed the amount necessary to be expended, on the average, for conducting the business. And to say this, in addition to what we have said in a preceding paragraph, is to say that the present and future resources of the association are abundantly sufficient to carry forward and discharge its obligations at maturity.

The foregoing is presented as a sufficient summary of the results of an investigation recently made by the undersigned, for the purpose of ascertaining and reporting upon the standing, solvency and prospective success of the Life Association, and we only add, in conclusion, an expression of our full belief in the integrity and honor of the central board of the corporation in St. Louis.

[Signed.] ELIZUR WRIGHT,
EDWIN W. BRYANT,
SHEPPARD HOMANS.

NEW YORK, May 28, 1872.

Mr. Wright signs the foregoing report with the following explanation:

When a policy is paid for by a series of equal cash premiums, I assume that a net valuation proceeds upon the hypothesis that the net premiums are equal. If this

be true, and if a note of the insured, secured by a lien on the policy, derives its value wholly from the fact that it can be used to meet a claim on the policy itself and no other, it follows that the series of equal cash net premiums pays for a policy equal to the face of the given policy, less the lien, whether the equal cash payments be called wholly premium or partly premium and partly interest. Hence the true net value or cash reserve on the reduced policy is precisely that which is reduced in the same ratio as the policy. Regarding the policy as not reduced by the note, but provided for in full by the note and cash, the note is certainly to be credited for its full face as an asset, and as certainly to be debited also as a liability, in addition to the aforesaid reduced cash reserve.

Granting the correctness of the above hypothesis, this method of valuation cannot possibly be wrong, because it corresponds exactly with all the facts of the case. What might be true or proper in a different state of facts, to-wit: where policies are paid for wholly by a series of unequal cash premiums or payments. I do not consider, relevant to the case of the Life Association, which presents no such policies. I fully and cheerfully concede, however, that the solution given to this question by my associates, treating the liens as so much cash, which they are not except perhaps by the intention of the policy, is still conservative and safe, having the effect in all the cases presented to make the reserve on each individual policy exceed the lien. The net valuation made on this plan only differs from that indicated above as the rigidly correct one, by enhancing slightly the cash margin of the first premium on the lien policies, and correspondingly reducing that of the succeeding premiums. Considering the cash margins more or less of the future premiums still intact, compared with the probable claims on them, either valuation is far from showing any near approach to insolvency. On the contrary, the sufficiency or rather abundance of the association's resources is fully demonstrated.

BOSTON, May 31, 1872.

To the Trustees and Policy-holders of the Life Association of America:

The Life Association of America having within the first three years of its existence attained a success never before known in the history of life insurance, it is, perhaps, not a matter of surprise that envy and unworthy rivalry should have sought for means with which to embarrass, and if possible, retard the prosperity of this institution.

To effectually silence the many calumnies by which the institution has been assailed, the directors resolved to cause an investigation so thorough as to expose every transaction, contract and liability of the association to the scrutiny of a committee of business men, assisted by a committee of eminent actuaries, such as no American life insurance company has ever invited, and whose report as to the solvency of the institution must place it beyond a doubt.

This examination was under the direction of the New York Department Board of Directors, appointed to investigate the financial condition of the association and integrity of its management, and especially as to the various charges so extensively circulated against it.

Prof. Elizur Wright, of Boston, and Messrs. Sheppard Homans and Edwin W. Bryant, of New York, were the actuaries selected to assist the committee of directors in their investigation.

We have submitted above their report *in full*, and in presenting them we think it due to the association that certain explanations should be made in reference to portions of the reports, that they may be the more readily understood by the policy-holders and the public.

The committee very properly mentions the unavoidable delay in furnishing their report. The "correct data" furnished the actuaries was the correction of clerical errors in grouping policies; the corrections were made under the supervision of and certified to by Mr. A. F. Harvey, actuary of the Missouri Insurance Department.

During the past fall, a holder of a number of investment endowment policies offered to surrender them to the association.

The offer was declined, in the face of a charge that these policies were issued contrary to the charter, and were injurious to the company. As soon as the actuaries pronounced them of a positively harmless character, the association accepted the offer, and has taken such steps as will guarantee within thirty days the cancellation of the remainder by repayment to the holders thereof the original consideration paid therefor.

We ask especial attention to the point of difference existing in the valuation of the lien policies in the plan approved of and adopted by the association, and the mode pursued by Messrs. Wright, Homans and Bryant, which is clearly set forth in their report as follows:

"The lien policies, in the association's valuation were treated as calling for a reserve by the tables for equal annual premiums. As before said, we consider that the lien has the effect of giving a larger first year's premium, and we have valued the policies accordingly."

The result of this mode of valuation is to require the association to keep a larger proportion of the premium in reserve during the first year of the policy, and a smaller sum each succeeding year. As the proportion of liens compared to the whole assets of the association is so small, besides the use of the plan having been discontinued, no particular benefit can be derived from the discussion of the subject. We will state, however, that several actuaries of note have recently examined these policies, and affirm the association's mode of valuation to be the correct one. The committee, no doubt for a want of understanding of the subject, state that the liens are not "valid assets." This is a mistake. No matter what mode of valuation is pursued, the liens cannot be considered other than valid assets. No actuary or department ever ruled otherwise. It will be perceived that the committee of directors, besides reporting upon the solvency of the association and the falsity of the various charges made against it, have recommended that certain changes be made in the charter and organization of the association. These recommendations, we think, would have been more appro-

priate as from one board of directors to another, and not to have been embodied in a report which was intended to give to the members of the association and the public the result of their investigation of the financial condition of the company, and the integrity of its past management. The recommendations, however, shall have due consideration.

That this association has survived and even prospered under the numerous assaults that have been made upon it, we believe to be largely due to the earnest zeal, integrity and ability of its various officers; the fidelity and energy of the managers and agents in the different departments, and the confidence of its patrons.

Notwithstanding the great publicity given to the fact of the association's undergoing a rigid examination, which usually tends to lessen confidence in a company, we are pleased to state that the association has increased its business handsomely since its last statement, Dec. 31, 1871.

With a little additional effort upon the part of the policy-holders and agents of the company, the increase of business for 1872 can be made most gratifying.

Published herewith are communications from Hon. Julius L. Clarke, Insurance Commissioner of Massachusetts, and C. E. King, Esq., Acting Superintendent of the Missouri Insurance Department, by which it will be seen that these departments adopt the same methods in the valuation of the lien policies as has been pursued by the actuaries of the association, which practically leaves the condition of the company, as far as it can be affected by the liens, the same as appeared by the published statement at the beginning of the year.

By order of the executive committee,
[Signed] JAS. H. BRITTON, Pres.

HON. WOOD BALDWIN, of Charlotte County, Virginia, has been elected by the legislature to fill the vacancy on the bench

of the Supreme Court of that State, caused by the resignation of Judge Jayne.

HON. WILLIAM LADD, Associate Justice of the Supreme Court of New Hampshire, has resigned on account of the smallness of his salary.

UNITED STATES CIRCUIT COURT FOR THE
DISTRICT OF ILLINOIS.

Tooley, Adm'r, vs. The Passengers' R.R. Assurance Co., of Hartford.

The assured purchased two accident insurance policies, good for two days, each for \$3,000. The policies contained a clause that the insurance should only extend to injuries, fatal or not fatal, "when accidentally received by the assured while actually traveling in a public conveyance provided by common carriers for the transportation of passengers."

The assured took passage from Chicago on the Illinois Central railroad, having purchased a ticket for Kankakee.

The train stopped at that place, and he alighted, standing in the door of the depot, while the engine took water, until the train started, moving slowly to the coal house, for the purpose of taking fuel, when he walked rapidly or ran to the train, and reaching the forward platform of the rear car, threw out his hand as if attempting to get on board, when he fell between the cars and was run over, receiving injuries from which he soon after died. The counsel for the defendant insisted that the accident did not come within the provisions of the policies, because it did not actually occur in a public conveyance. The court instructed the jury that the phrase "traveling in a public conveyance," could not be literally construed; that if the accident occurred while the insured was either getting on or off the train, or attempting to do so, for any reasonable purpose incident to railway travel, it came within the terms of the policy. Verdict for plaintiff.

CURRENT TOPICS.

—Nathan Willey, Esq., of New York, has been appointed actuary of the new Insurance Department of Ohio. Our acquaintance with Mr. Willey dates from his membership in Yale College, where he distinguished himself by his proficiency in mathematical studies, and we can say that the department has secured an excellent man. Mr. Willey is the author of a standard work on Life Insurance.

—The Virginia legislature has passed a bill imposing a license tax of \$200 upon insurance companies from other States, and an annual tax of 1-2 per cent. upon their gross receipts.

—The *London Times* states that the number of fires in warehouses in Liverpool became so large that the municipal authorities appointed two policemen to take away their pipes from the men as they came to work. In two years 573 pipes were taken away, and the result was an important diminution in the number of fires.

—Emerson W. Peet has been elected Vice-President of the National Life Insurance Company of the United States.

—The marine losses of 1871, so far as United States vessels totally lost or missing, are concerned, were 445 vessels, worth \$11,985,010. The aggregate loss was higher by \$1,200,000 than in 1870.—*Spectator*.

—The Andes Insurance Company, of Cincinnati, has resolved to reduce its capital from \$1,000,000 to \$500,000.

—The actuary of the Clergy Mutual Life, of London, gives it as his opinion that the mortality of clergymen is 20 per cent. less than the average mortality of Englishmen.

—NATIONAL LIFE OF CHICAGO.—We are informed by the officers of this company that in our last number, in alluding to their experience in the lapsing of policies, as shown by their last report, we have not done justice to them or the subject we were treating. They state that the large number of their lapses for that year were due to special causes, and that

their present experience shows a very different state of facts. Prior to that report the company had changed its method of collecting assessments for death losses, requiring them to be paid in advance instead of after each death, and when parties had neglected to pay their assessments, and the 30 days of grace had expired, they were not reinstated, except by consenting to the advance payments. This condition many declined to accept. The company also suffered seriously by the effects of the great fire, which caused many to fear that the company had been ruined in the general calamity.

The officers assure us that an examination of their books will show us that their lapses since that time have not been greater than the average of the old line companies, or even as great. The report of Mr. Merritt, manager for the company of the St. Louis department, where several hundred policies were issued during the year past, shows less than 11 per cent. of lapses.

This statement, which we cheerfully give, and the truth of which we do not doubt, relieves the company from a false impression, and materially changes our conclusion in the article referred to, so far as it applies.

—The Connecticut legislature has repealed the usury laws.

—We are indebted to C. M. Morrison, Esq., of Springfield, Illinois, and B. D. Lee, Esq., of St. Louis, attorneys for the plaintiff in the case, for the statement and opinion in *Tooley, Adm'r, vs. The Passengers' Railway Assurance Co.*

—The Supreme Court of Virginia held, in a recent case, that a stock-holder in one railroad company cannot be compelled to merge his stock in that of the company with which his road has consolidated.—*Pittsburgh Legal Journal*.

—A Gate city lawyer included in his bill against his client: "To waking up in the night and thinking about your case, \$5.00."

—An eminent Western lawyer once made the following rather remarkable speech to a jury, in a case against a railroad corporation, where he appeared for the defense. He was sure that upon a

point of law, saved for the upper court, his clients would get a finding in their favor. He addressed the twelve as follows: "Gentlemen of the jury. My clients have brought a good many cases before a jury, and always got whipped. They always expect it. We don't look for a verdict in our favor; and in this case we don't care whether you give us a verdict or not. We have got you now, gentlemen. Yes, gentlemen, we don't care a picaune whether you bring in a verdict for or against us; for we've got you! Do just as you please; it don't make any difference to us. I haven't anything more to say." The jury gave him a verdict.

—It will surprise our readers to be informed that a single life company in London—the Prudential—issued in 1871 twice as many policies as were issued last year by all the American life offices put together. Of course the volume of insurance bore no sort of proportion to the number of policies issued, for the 406,848 policies represented a premium income of only \$696,000, or about \$1.75 each.—*Spectator*.

—The Virginia Senate has refused, by a vote of 21 to 8, to repeal the law punishing petty convicts by the lash. Whipping is common. Every county and city has its post, its thongs, and its whipper.—*Pittsburgh Legal Journal*.

—Judge Thornton, of the Supreme Court of Illinois, in the *Reaper City vs. Jones*, coincides with Judge Davis, of the United States Supreme Court, in his opinion regarding the use of small type in stating the conditions of policies. He says, "Such conditions, printed, as they usually are, in the smallest type, and read with the greatest difficulty, are but traps, when the attention is not called to them."

—Josh Billings says a large policy of life insurance don't exactly make a man's corpse smile at his widow, but it helps amazingly to get another fellow to do it for him.

—The dry proceedings of the law courts in Texas are sometimes enlivened by little incidents, which we are seldom entertained with in this part of the country.

In Boone county, lately, a suit was brought to recover \$500 for a donkey, when the donkey himself was tendered in open court. He was made as decent and presentable as possible by a pair of linen pants slipped on his fore legs, a stove-pipe hat on his head, and a pair of spectacles on his venerable nose. The judge and jury were convulsed, and the suit withdrawn.—*Legal Opinion*.

—An uneducated judge closed a sentence with the following touching reproach: "Prisoner at the bar, nature has endowed you with a good education and respectable family connections, instead of which you go prowling around the country stealing ducks."

—A good story is told in connection with a recent fire in this city. The stock of goods in the building adjacent to where the fire occurred was insured for \$125,000. The sky-lights of this store were broken, letting in some water, and there were scattered over the floor of the upper story a large quantity of broken glass, cinders, ashes, &c., giving it a decidedly bad appearance. A clerk of one of the offices insuring the stock in the store comprehended the situation, and, employing a gang of men, gave the place a thorough cleaning up before the arrival of the occupants of the premises, and there was scarcely a vestige of the fire and water remaining. The insured parties put in a claim for \$125, which was cheerfully paid. Those who saw the place before the cleaning up say that, if the damage had been estimated while it was in that condition, the insurance companies would have been called upon to pay from \$3,000 to \$5,000.—*Boston Traveler*.

—A late review of criminal statistics, published at Brussels, states that during the year 1871, twenty murderers, eight forgers, eight incendiaries, three burglars, three shop lifters, and several other criminals, convicted of various crimes, were pardoned out of the German penitentiaries on condition of their going to the United States.

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DIGEST OF DECISIONS,

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

BANKRUPT LAW.

§ 195. FIRE.—*State and National—State Receivers.*—By a final decree of the State Supreme Court, in a suit instituted by the Insurance Commissioner against the company, in behalf of the State, an injunction previously issued was made perpetual; the petitioners were appointed receivers, and it was "further adjudged and decreed that said corporation be and the same is hereby dissolved." The company became insolvent, after the passage of the bankrupt act, and committed such acts of bankruptcy as brought it within the provisions of the act. Creditors filed their petition in the United States District Court for adjudication of bankruptcy against the company, and subsequent to the decree of the State Court, the company was adjudged bankrupt, and a warrant of bankruptcy was issued. *Held*, that the "State laws on the subject of bankruptcy and insolvency must yield to the law of Congress on the same subject, when the State law applies to the same subject-matter; and when it differs in

material respects from the laws of Congress, it appears clear that the State law is suspended, while the law of Congress remains in force."

Ex parte Eames, 2 Story, 323; *Sturgess vs. Crowningshield*, 4 Wheaton, 122-196; *Ogden vs. Saunders*, 12 Wheaton, 212; *May et al. vs. Buel*, et al., 7 Cushing, 40; *Griswold vs. Pratt*, 9 Metcalf, 23; *Thornhill et al. vs. Bank of Louisiana*, 5 B. R., 372.

Held, also, that the receivers "have no power to withhold the assets of the company, and to liquidate its liabilities and affairs, according to the mode provided by the State law for the liquidation of insolvent corporations."

Thornhill vs. Bank of Louisiana, 10 B. R., 375.

*Reed et al., Pet'rs, in Matter of Independent Ins. Co.**

Rep'd Jour'l p. 735.

U. S. C. C., DIST. MASS.

§ 196. FIRE.—*State and National—Conflict of.*—After the passage of the bankrupt act, the company became insolvent and committed such acts of bankruptcy as brought it within the provisions of the act. *Held*, that "After this time the operation of any State law regulating the assignment and distribution of the property of the insolvent debtor corporation, and affecting the same persons, property and rights that would be affected by proceedings under the bankrupt act, was suspended." "When the power is exercised by Congress, and a bankrupt law is in force, it does suspend all State insolvent laws applicable to like cases, and this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such a result."

Cushing vs. Arnold et al., 9 Metcalf, 23.

Reed et al., Pet'rs, in Matter of Independent Ins. Co.

—§ 196.

BILLS AND INVOICES.

§ 197. FIRE.—*Certified Copies of.*—A clause in the policy provided that "the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and exhibit the same for examination to any person named by the

* Decision rendered 1872.

company, and that until the proofs, declarations and certificates (stipulated for in case of loss) were produced, and examinations and appraisals permitted, the loss should not be payable." The bills of exception stated that there was evidence tending to show that the plaintiffs were requested to produce *duplicate* bills, but there was no evidence to show when the request was made, whether before the commencement of the actions or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. *Held*, that there was no error in refusing to instruct the jury that "if they believed from the evidence the plaintiffs were requested by the defendants to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of the actions, their right of action never accrued, and that the verdicts must be for the defendants."

*Insurance Companies vs. Weide et al.**

Rep'd Jour'l p. 787.

U. S. S. C.

CONSTRUCTION.

§ 198. FIRE.—*By Agent*—"Flax Factory".—"At the time the risk was taken, appellee notified the agent that he intended to put in rope machinery, and he inquired whether it would affect the policy, and was informed it would not, as the term flax factory was broad enough to embrace it." *Held*, that the agent was correct in his definition of the term "flax factory." The manufacturing of rope is an usual part of the business, and there was no breach of the condition. But if there was, "the agent was acting within the scope of his authority, and was, when appellants authorized him to take policies, empowered to give a construction to the written portion of the policy, if no more, and the company must be held estopped by this declaration of their agent."

Aurora Fire Ins. Co. vs. Eddy.†

Rep'd Jour'l p. 752.

ILL. S. C.

* Decision rendered May 6th, 1872.

† Decision rendered February, 1871. To appear in 54 Ill.

CORPORATION.

§ 199. FIRE. *Dissolution of—By Decree of Court—Bankruptcy of—Statute.*—By a final decree of the State Supreme Court, in a suit instituted by the Insurance Commissioner, in behalf of the State, against the company, an injunction previously issued was made perpetual; the petitioners were appointed receivers, and in the language of the court it was "further adjudged and decreed that said corporation be and the same is hereby dissolved." *Held*, that the statutes of the State, under which these proceedings were instituted by the Insurance Commissioner, do not contemplate or authorize any such decree as would annul the existence of the corporation, and no such decree was sought in the petition or made by the court, and that "by a fair construction of this language, as used in the concluding portion of the decree, it was the intention of the court only so far to dissolve the corporation as in the language of the statutes, under which they were acting, might 'be needed to suspend, restrain or prohibit' the further continuance of the 'business' of the company," and that the corporation still exists for the purpose of being proceeded against in bankruptcy.

Slee vs. Bloom, 19 Johnson, 456; *Penniman vs. Briggs*, 1 Hopkins, Ch. R., 300; S. C., 8 Cowan, 387; 2 Kent's Com., 311, 312; *Folger vs. The Columbian Ins. Co.*, 99 Mass., 267. See, also, *Coburn vs. Boston Papier-mache Mfg Co.*, 10 Gray, 243; *Taylor vs. Columbian Ins. Co.*, 14 Allen, 353; *Bacon vs. Robertson*, 18 Howard, 485-487; *Lum vs. Robertson*, 6 Wall., 277; *Hunt vs. The Columbian Ins. Co.*, 55 Maine, 291. *Hayward vs. Fulcher, Sir William Jones*, 166. See, also, *Case of the Dean and Chapter of Norwich*, 3 Coke, 75, *a*.

Reed et al., Petrs., in Matter of Independent Ins. Co.

—§ 195.

§ 200. FIRE.—*Bankruptcy of.*—*Held*, that Congress is as competent to apply laws on the subject of bankruptcy to private corporations, created by the States, as to natural persons or private corporations created by authority of Congress.

Sweet vs. B., H. & Erie R. R., 5 B. R., 240.

Held, also, that "The Independent Insurance Company, of Bos-

ton, is a corporation created by the laws of Massachusetts, to transact the 'business' of insurance. It is clearly included in the class of 'business or commercial corporations' to which the provisions of the bankrupt act apply."

Reed et al., Pet'rs, in Matter of Independent Ins. Co.

—§ 196.

EVIDENCE.

§ 201. FIRE.—*Promise of Officers to Pay Loss.*—"The court below permitted appellee to introduce evidence tending to prove a promise by the president and secretary of the company to pay the loss, after it had occurred." *Held*, that "The evidence was proper for the consideration of the jury. It might reasonably be inferred from such evidence, that these officers had carefully examined the circumstances of the loss, and become convinced it was a fair one, and was properly payable. It would certainly be evidence to that, if to no greater extent, and it was clearly admissible."

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

§ 202. FIRE.—*Inventory—Lost Copy of.*—"The plaintiffs, in the court below, introduced evidence, without objection, tending to show that before the fire they had taken a correct inventory of their stock, which was correctly reduced to writing, by one of them, in an inventory book, and that the prices or values were correctly footed up therein, and that, at the same time, the footings were correctly entered by one of the plaintiffs on the fly leaf of an exhausted ledger, and were afterwards transferred by one of the plaintiffs to the fly leaf of a new ledger. The plaintiffs offered in evidence the footings on the fly leaf of the new ledger. Both the inventory book and the exhausted ledger had been destroyed, and neither of the plaintiffs could remember the amount of the footings. *Held*, that these entries were properly admitted by the court below, and that it is of little importance whether the footings in the new ledger were taken from the inventory book or from the fly leaf of the old ledger, for as those entries were made at the same time, neither

ought to be regarded as a copy of the other, but rather both should be considered as originals.

Insurance Companies vs. Weide, 9 Wall., 677.

Insurance Companies vs. Weide et al.

—§ 197.

PERSONAL EXAMINATION.

§ 203. FIRE.—*Of Insured.*—By the conditions of the policies, the assured, after furnishing proofs of loss, were bound, if required, to submit to an examination under oath, and it was stipulated that until such examination should be permitted, the loss should not be payable. The plaintiffs submitted to an examination, but declined to answer questions respecting the amounts for which they had made settlements with other insuring companies. *Held*, that the examination contemplated relates to matters pertinent to the loss; that the questions proposed had no legitimate bearing upon the inquiry, what was the actual loss sustained in consequence of the fire, and that "there was no sufficient foundation laid for the instruction requested by the defendants, that if the jury should believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policies, refused to answer any questions by which the defendants could fairly estimate, or reasonably infer plaintiffs' real loss in the insured property, and had not before the commencement of the actions answered the questions under oath, the verdict must be for the defendants." "There was no evidence of refusal to answer *such* questions."

Insurance Companies vs. Weide et al.

—§ 197.

POLICY.

§ 204. FIRE.—*Construction of—Instructions to Jury.*—The policy contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water on the first floor, where the machinery is run, and four in the basement by the reservoir, ready for use at all times, in case of

fire." On trial in the court below, the following instruction was refused: "The jury are instructed, that so far as relates to the question of buckets, the policy requires that the plaintiff must keep 'at all times ready for use in case of fire, four buckets of water' in the basement story, and eight buckets on the middle floor; and the plaintiff must show affirmatively that he did substantially so keep said buckets of water, and if he has not proved these facts, the jury must find for the defendant." The court had already given the following instruction: "If the jury believe from the evidence that buckets could not be kept in the mill filled with water all the time, in accordance with the literal provisions of the policy, because of freezing, then a literal compliance with the said provisions of the policy concerning buckets, was not required and could not have been in the contemplation of the parties when the policy was made, but all that was required by [of] the plaintiff in order to comply with such stipulation was to have the required number of buckets in good and serviceable condition at the proper places ready for instant use." *Held*, that the form of the instruction refused was calculated to mislead, and was erroneous. What would be a substantial compliance with a contract is very indefinite. The instruction given was clear, definite and free from misapprehension, and presented the law of the case fairly to the jury.

Taylor vs. Beck, 13 Ill., 336.

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

§ 205. FIRE.—*Avoidance of—False Swearing—Jury.*—The policies stipulated that fraud and false swearing on the part of the assured, should work a forfeiture of all claims under them. *Held*, that "the false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. But it does not invariably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath, in their proofs of loss, and their statements when testifying at the trial, that the former were false, so as to justify

the court in assuming it, and directing verdicts for the defendants." "It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations, which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent."

Insurance Companies vs. Weide et al.

—§ 197.

§ 206. FIRE.—*Construction of—Jury.*—The policy contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water on the first floor, where the machinery is run, and four in the basement by the reservoir, ready for use at all times, in case of fire." *Held*, "that a reasonable construction of this clause required, that while, from freezing or unavoidable causes, a literal compliance with the warranty might have been impossible, and could not have been in the contemplation of the parties, still, it was incumbent on the assured to show that the required number of buckets, in good and serviceable condition, were at the places designated in the agreement, ready for instant use. This being the requirement, it devolved upon the assured to prove that he had complied therewith." "It is the province of the jury to carefully weigh the whole of the evidence, and to find according to its weight, and the presumption is that they have done so, unless we see from the record that they misunderstood or disregarded the proof. The court will not disturb their finding on any question, unless it appears clearly to be unsupported."

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

SMOKING.

§ 207. FIRE.—*Prohibition of.*—The policy provided that "Smoking shall be strictly prohibited in or about the buildings." "Appellee prohibited smoking, and there is no evidence that he had any notice that his orders had been disregarded, so as to

require him to resort to other and more energetic steps for its prevention." *Held*, that there was a literal compliance by the appellee with his part of the agreement to prohibit smoking. "He did not agree that, if there should be smoking in or about the buildings, the policy should be void." "Had the evidence shown that his orders were disregarded, and that it had come to his knowledge, then a different question would have been presented for our consideration. But the jury were, under the evidence before them, warranted in finding appellee had used reasonable efforts to prevent smoking in or about the buildings."

The Insurance Co. of North America vs. McDowell, 50 Ill., 121.

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

TITLE.

§ 208. FIRE.—*Transfer of—Mortgage of Property.*—The policy contained the following clause: "If the title of the property is transferred or changed, or the policy is assigned without written permission hereon, this policy shall be void." "It appears that when the property was insured, Eddy was only the owner of the equity of redemption, Town then holding a mortgage on the premises, and loss, if any, was payable to Town, as his interest might show. Subsequently, appellee conveyed the premises, with other property, to Brown, and he, at the same time, and as a part of the same transaction, gave back to appellee a defeasance. This arrangement was made to enable Eddy to take up his mortgage to Town, which was done, and to procure means for other purposes." *Held*, "that this conveyance and defeasance only constituted a mortgage, is so obvious that the citation of authorities to establish the proposition is wholly unnecessary." "It was but an equity of redemption that was insured, and this transaction still left appellee as fully the owner of the equity of redemption as he was at the time the insurance was effected. This was not, therefore, any change or transfer of title in appellee, but the only change was, that a different person held the mortgage, and it was, perhaps, for a different

amount. But appellee's title was the same." And if this were not so, still, the execution of a mortgage on the insured premises is not a sale, alienation, conveyance, transfer or change of title, such as is prohibited by the policy. The right to insist upon such a forfeiture is *stricti juris*; and liberal intendments and enlarged constructions will not be indulged in, in favor of such forfeitures. They must be brought clearly within the forfeiting clause.

Commercial Ins. Co. vs. Spankneble, 52 Ill., 53.

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

WARRANTY.

§ 209. FIRE.—*Continuing—Stoves—Jury.*—"The question was asked, 'How is the building warmed? If any stoves and pipes, how are they secured?' To this it was answered, 'No stoves used.' Appellee agreed in the application, that if any untrue answer was given therein the insurance was to be void, and the policy of no effect." It is claimed that a stove was subsequently used for the purpose of warming the building. *Held*, that this representation was not a continuing one, and was not a warranty that a stove should not be used for warming purposes, and that the use of the stove was not a breach of the warranty.

Schmidt vs. The Peoria Fire and Marine Ins. Co., 41 Ill., 295.

It was for the jury to say whether the stove was used in a grossly negligent manner, and they have found it was not.

Aurora Fire Ins. Co. vs. Eddy.

—§ 198.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

SUPREME COURT OF WISCONSIN,

JANUARY TERM, 1872.

Appeal from Circuit Court of Green Lake County.

JOHN BLACK *et al.*, Respondents,

vs.

THE WINNESHEIK INS. CO., Appellant.*

By a provision of the policy it was to be void unless suit was brought within twelve months after the loss occurred. The fire occurred October 17th, 1869. On the 6th of November of the same year, the parties entered into an agreement, by which the assured agreed to accept, and the company agreed to pay the amount that had been determined by an adjustment, on the 6th of February, 1870, unless the assured should be notified by the company before that time of its intention to contest its liability, under the policy, for the loss. The company gave no notice of such intention, and suit was brought November 7th, 1870.

Held, that, the period from November 6th, 1869, to February 6th, 1870, should be excluded in the computation, and that the action was brought within the limitation specified in the policy.

GEO. D. WARING, *for Respondents.*

RYAN & KIMBALL, *for Appellant.*

COLE, J.

This is an action upon a policy of insurance. The only defense

* Decision rendered April 24th, 1872.

set up and relied on in the answer is, that the action was not brought within twelve months after the loss occurred, according to the terms of the policy. It appears that the loss occurred on the 17th of October, 1869, and that the complaint was served on the 7th of November, 1870. It is stated in the complaint, and not in any way controverted, that the amount of loss sustained by the fire was adjusted between the assured and the company on the 6th of November, 1869, when the parties entered into an agreement in writing, by which the assured agreed to accept the amount adjusted and determined in full payment of his loss, and the company promised to pay that amount on the 6th of February, 1870, unless the assured should be notified by the company before that time, either personally or by letter of its intention to contest its liability under the policy for the loss. The company gave no notice of any kind of its intention to contest its liability upon the policy. Excluding from the computation the period from November 6th, 1869, to February 6th, 1870, and it is apparent the action was brought within the limitation specified in the policy. And the question is, Should not that time be excluded in the computation? We are very clear in the opinion that it should be.

On the adjustment of the loss, the company agreed to pay, and the assured agreed to receive, three-fourths of the amount insured, on the 6th of February, 1870, unless it notified the assured of its intention to contest its liability. I cannot see why this was not a valid agreement, made upon a sufficient consideration. But suppose it was not. Every principle of honesty and fair dealing requires that the limitation should not run during the time mentioned in the agreement, inasmuch as the company failed to notify the assured that it intended to contest its liability upon the policy. He had the right to assume that the company would either pay the amount adjusted and agreed to be paid on the 6th of February, or notify him that it did not intend to pay, and that he would be driven to his legal remedy. And this time that he was induced by the act of the company to delay bringing suit should not be considered any part of the twelve months to which his action was limited. This point was so decided in the case of *Killips vs. Putnam Ins. Co.*, and the decision rests upon the clearest and firmest principles of law and morality. It was there said by Mr. Justice Lyon that the time lost by the plaintiff without any fault on his part, but through the fault of the defendant, should be added to the time within which the parties in the first instance contracted that the action should be commenced, and that the plaintiff is not barred until

such additional time has expired. That case is decisive of the one before us.

The judgment of the circuit court is affirmed.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1870.

Appeal from Recorder's Court of the City of Chicago.

THE CINCINNATI MUT. HEALTH ASSUR. CO., *App'ts*,
 vs.
 RUDOLPH ROSENTHAL *Appellee*.*

Foreign Corporations—Powers of the States to prescribe Conditions.—It is competent for the several States of the Union to prescribe the conditions upon which an insurance company, or other corporation created in another State, may transact business within their borders. Corporations are not citizens of the State in which they were created, within the meaning of the federal constitution, so as to exempt them from the operation of such conditions.

Nor is this power of the State to impose conditions upon foreign corporations, at all affected by the permission given in their charters to do business in other States than that of their creation. The boundary of each State is the territorial limit of its legislative power.

Contracts declared to be unlawful, are void. Under the act of 1855, it is unlawful for any insurance company incorporated in another State, to transact any business of insurance in this State, without first procuring a certificate of authority from the auditor of State, such certificate to be based upon a statement to be made by the company, the character of which is prescribed in the act.

So where an insurance company, incorporated in another State, undertook to transact business of insurance in this State, without having complied with the conditions of the act of 1855, receiving from a party assured his promissory note for stock in the company and for premium, the contract being unlawful under the statute, the note was held to be absolutely void in the hands of the company, and this, notwithstanding the statute imposed a penalty upon the company for doing business in this State in violation of its provisions.

Quare, whether the holder of a policy of insurance, issued in this State by a foreign corporation which had not complied with the conditions of the act of 1855, would have his remedy against the company in case of loss?†

MOORE & CAULFIELD, *for Appellants*.

ROSENTHAL & PENCE, *for Appellee*.

WALKER, J.

* Decision rendered Jan. 25th. 1871. † Syllabus by N. L. Freeman, Esq., State Rep'r. Ill.

This was an action of assumpsit, brought by appellants, in the recorder's court of Chicago, against appellee, to recover the unpaid balance of a note. The note was given to appellants for stock in the company and for premium, subject to the call of the directors of the company. The general issue was filed, also a special plea. The latter plea, in substance, averred that appellants were an assurance company, created under the laws of the State of Ohio and not under or by the laws of this State, for the purpose of insuring the health of persons against personal injury or disability; that at the time the note was given, appellants were an insurance company under the laws of Ohio, and had come into this State to transact business as such; that in consideration appellee would pay to appellants \$150 cash, and would execute to the company a note for \$350, due on demand, to be paid subject to the call of the directors of the company, did unlawfully enter into a contract to insure the health of appellee, for the period of five years, in the sum of twenty-five dollars for each week he might be prostrated by disease during the next five years, whether from disease or by accident, which should prevent him from prosecuting any kind of business, and the company then issued a policy on these terms to appellee. Appellants also agreed to issue to appellee a certificate of stock of its guaranteed capital, in the company to the amount of \$500, which was issued and delivered, and was by him accepted when he paid the money and gave the note sued upon in this case.

It was further averred that, at the time this agreement and transaction were consummated, appellants were a corporation created by the laws of the State of Ohio, and had not, at any time previous thereto, furnished the auditor of this State with the statement of the condition and affairs of the company, under the oath of the president or secretary of the company, showing the facts required by the laws of this State, nor had the auditor issued to the company, or any agent, any authority to transact business in this State, which, it is averred, rendered the note sued upon void and of no binding effect. To this plea appellants filed a demurrer, which was overruled by the court, and judgment was rendered on the demurrer in favor of appellee, to reverse which, the record is brought to this court by appeal, and appellants assign the overruling of the demurrer as error.

This record presents the question, whether foreign insurance companies can, without first complying with the laws of our State, enacted for their regulation, make contracts which they may enforce. Our general assembly on the fourteenth of February, 1855, Scates' Comp.

§ 1, p. 596, enacted, that it should not be lawful for any agent or agents of any insurance company incorporated by any other State than this, to directly or indirectly take risks, or do or transact any business of insurance in this State, without first procuring a certificate of authority from the auditor of State. And before obtaining such certificate, such agent is required to furnish the auditor with a statement, under oath, of the president or the secretary of the company, which shall show—First, the name and locality of the company; second, the amount of its capital stock; third, the amount paid up; fourth, the assets of the company, and of what they consist; fifth, the amount of liabilities, etc.; sixth, losses adjusted, due, etc., which is required to be filed with the auditor, together with a written instrument, under the seal of the company, signed by the president and secretary, authorizing such agent to acknowledge service of process on behalf of the company, and consenting that service of process upon him shall be held valid, and waiving all error by reason of such service. The act then requires that the company shall possess a capital of at least \$100,000 of actual capital invested in stocks at par, or upwards, or in bonds or mortgages of real estate worth double the amount for which it is mortgaged, as a condition to their doing business in this State.

Now, the demurrer admits that none of these requirements had been observed by appellants. The act, it is seen, in express language, prohibits such companies from effecting insurance or transacting business in this State until they have filed the statement and consent required. Corporations created in another State are not citizens of such State within the meaning of the federal constitution. This question is settled by the case of *Ducat vs. City of Chicago*, 48 Ill., 173, and the case of *Paul vs. The State of Virginia*, 8 Wal., 168, subsequently decided by the Supreme Court of the United States. We regard this question as settled, and shall, therefore, omit any discussion of that point. In those cases it was held that the various State legislatures have the power to impose conditions upon which insurance or other corporations, chartered beyond the State, may do business within its territory; that the right of protecting their citizens from the fraud and imposition of insolvent or spurious corporations of this character, created by other States, was clearly within the scope of legislative power possessed by the various States of the Union. And in this view of the case, it cannot matter that the charter of this Ohio company declared that it might do business in other States. If such a provision was inserted, it could only operate as an authority to the

company, to do so on such terms as other States might prescribe. That State does not, nor can it, have any power to enact laws regulating the actions of persons, the title to property, or the effects of contracts, in this or any other State. The boundary of that State is the limit of its legislative power. If such a provision is contained in the charter of appellants, it was not enacted to become the law of other States, but simply, as we have said, to license the company to transact business beyond the limits of their State, with the consent of the foreign jurisdiction in which they proposed to act. This company, then, were bound to conform to the law to which we have referred, before they were authorized to effect insurance or make contracts in this State.

From this enactment, it is manifest that our general assembly adopted these provisions as a matter of general policy, intended and well calculated to protect the people of the State from loss by foreign insurance companies, who are insolvent or worthless, by requiring all foreign companies, before they could transact business in this State, to make an exhibit of their condition, and file it with the auditor of public accounts, by which our citizens could know whether such a company was responsible before entering into contracts of insurance with them. That such provisions were demanded, is no doubt true, and that they are highly remedial, we do not doubt. The note was made and delivered, and the policy given and the contract consummated in this State, in defiance of a law, which is so plain in terms, that it can bear no misconstruction, and which no one can misunderstand, declaring all such contracts unlawful. It says, it shall not be lawful for any such agent, directly or indirectly, to take risks, or transact any business of insurance in this State, until they comply with the terms prescribed in the act. To permit the company, when they admit that they have disregarded all of these requirements, to recover, would be for the courts to disregard the clearly expressed will of the general assembly, and to say what it has said shall be unlawful, is and shall be lawful and binding. To enforce the payment of this note would be, virtually, to repeal a plain enactment of the legislature.

When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual, the same rights in enforcing prohibited contracts, as

the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt. See *Munsell vs. Temple*, 3 Gilm., 9. That courts may have held, that when a statute has prohibited the doing of an act, and imposed a penalty, simply, the act was not void, may be true, but we doubt the correctness of such a construction.

That the legislature imposed, by a subsequent section of the act, a penalty for the violation of the provisions of the law, does not, in the remotest degree, legalize or give validity to the note. It but shows that the general assembly intended to adopt such measures as should compel the observance of the law. Had no penalty been provided, no one would have, for a moment, hesitated to say, that the note was, under this law, utterly void: and if so, why should we hold, that the imposition of the penalty alters, or changes in the slightest degree, the previously declared will, that the act should be unlawful. In the case of *Bensley vs. Bignold*, 5 Barn. & Ald., 335, where a printer had brought an action to recover for the price of paper furnished, and printing a pamphlet entitled, "An elucidation of the system of fire and life insurance," it was held, that a recovery could not be had, because the name of the printer, the place of his abode, and the place where printed, were omitted from the front page of the pamphlet, contrary to an act of Parliament, which prescribed a penalty of £20 for such omission.

In the case of *Law vs. Hodgson*, 2 Camp., 147, it was held, that a person selling bricks under the statutable size, who thereby forfeited a penalty of twenty shillings, could not recover for them. This case is also repeated in 11 East, 300. In the case of *Langton vs. Hughes*, 2 Maule & Selw., 593, it was held, that a druggist who sold drugs to a brewer, knowing they were to be used, contrary to the statute, in manufacturing beer, could not recover. And Lord Ellenborough places it upon the ground that the statute was designed to protect the public health and the public revenue. And LeBlanc said, in delivering his opinion, that it "is an established principle, that the court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law." It has been held, that where a person sells goods, knowing that they are intended to be smuggled, he is not permitted by the policy of the law

to recover on such a contract. *Briggs vs. Lawrence*, 3 T. R., 454 ; *Clugus vs. Pinkham*, 4 T. R., 466 ; *Waymell vs. Ried*, 5 T. R., 599. In the decision of these cases, a number of other adjudged cases are referred to, which support and illustrate the rule. And *Wheeler vs. Russell*, 17 Mass., 258, is to the same effect. Many other decisions could be referred to in support of the doctrine, were it deemed necessary.

This contract, on the part of the insurance company, is against the manifest policy of the law ; is expressly made unlawful by the statute, and prohibited. It is, therefore, void and of no effect. Notwithstanding the company have acted in contravention of the statute, and have no right to recover, we are not prepared to hold that the appellee has so acted that, had he sued upon the policy before repudiating it, he could not have recovered upon its breach. But that question is not now before the court, and hence it is not discussed or determined. The plea presented a good defense, and the demurrer was properly overruled, and the judgment of the recorder's court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1871.

Appeal from Cook County.

HOME MUTUAL FIRE INS. CO., OF CHICAGO, <i>App't</i> ,	}
vs.	
GEORGE HAUSLEIN, FOR THE USE OF SEIBERT, <i>Appellee</i> .*	

The policy contained a condition that in case of any sale, transfer, or change of title in the property insured, the insurance should be void, and cease. A section of the charter of the company—a mutual company, of which the assured became a member—printed on the back of the policy, also provided that the policy should be void upon any alienation of the property, by sale, or otherwise.

* Decision rendered April 11th, 1872.

At the time the insurance was effected, the insured was the absolute owner of the property. He afterwards made an assignment of the policy to Seibert, the mortgagee, with the assent of the company, and subsequent to this, sold and conveyed the property to three other persons, one of whom re-conveyed to him, and the other two executed mortgages to secure the purchase money.

-- The assignee of a policy, takes it subject to the conditions expressed upon its face; and his equities confer no right, if the assignor has lost all right of recovery by a violation of the terms or conditions of the policy." The assignee knew of the condition in the policy, providing for forfeiture in the event of alienation, and his rights must be controlled thereby.

There was a change of title in the property. The absolute ownership of the entire property, is easily distinguished from the ownership of one-third, and a mortgagee of two-thirds.

The assignment was made with the consent of the company, but the condition of forfeiture, upon alienation, without the consent of the company, was still applicable to the assignee, as well as to the insured. The company did not waive the effect of the breach of the condition. By the act of the insured the policy became void.

It was contended that the memorandum, that the loss, if any, should be payable to the assignee, as his interest might appear, shows that his interest was intended to be protected; and that the change of title did not affect his interest.

The insured cannot sue, because he had so acted as to forfeit the policy. The assignee cannot sue, for he was not a party to the contract originally. In its nature the policy was only assignable so as to pass an equitable interest to the assignee. Even, as in this case, where the assignment was made with the consent of the company, the assignee cannot sue for a breach in his own name.

THORNTON, J.

The effect upon the policy caused by the alienation of the property insured, is the only question argued.

One of the conditions of the insurance, made a part of the policy was, that in case of any sale, transfer or change of title in the property insured by the company, the insurance shall be void and cease.

The title of the assured to the property at the date of the policy is not questioned, and the assignment to Seibert, the mortgagee, was made with the assent of the company.

After the execution and delivery of the policy, and the making of the assignment, the assured sold and conveyed the property to three other persons. One of them re-conveyed to him, and the other two executed to him mortgages to secure the purchase money.

At the time the insurance was effected, the assured was the absolute owner. At the time of the fire, he owned one-third, and was mortgagee of two-thirds of the property.

It has been fully settled by this court, that the assignee of a policy takes it subject to the conditions expressed upon its face; and his equities confer no right if the assignor has lost all right of recovery by a violation of any of the terms or conditions of the policy. Ill. Mut. Fire Ins. Co. vs. Fix, 53 Ill., 151.

When the assignment was made, the assignee knew of the condition in the policy providing for forfeiture in the event of alienation;

and his rights must be controlled thereby. His position is identical with that of the assured, so far as the terms of the contract must govern the rights of the parties.

There was unquestionably a change of title in the property. The absolute ownership of the entire property is easily distinguished from the ownership of one-third and a mortgagee of two-thirds. The interest at the time of the insurance and at the time of the loss was not the same.

The insured became a member of a mutual company, and contracted that he would not make a sale of the property insured, or change the title, and that if he did do so, the insurance should cease.

The condition is plain, and we must interpret the contract according to the intention of the parties, to be gathered from the language employed.

Section fifteen of the charter of the company, which was printed on the back of the policy, provided in as absolute terms as the condition of the policy referred to, that the policy should be void upon any alienation by sale of the property or otherwise.

There can be but one conclusion : that by the act of the insured the policy became void. *Dix vs. Mercantile Ins. Co.*, 22 Ill., 272 ; *Hartford Fire Ins. Co. vs. Ross*, 23 Ind., 179 ; *Finley et al. vs. Litchfield County Mut. Ins. Co.*, 30 Penn., 311 ; *Tittmore vs. Vermont Mutual Fire Ins. Co.*, 20 Vt., 546.

But it is contended that the memorandum, that the loss, if any, should be payable to the assignee, as his interest might appear, shows that his interest was intended to be protected ; and that there was no sale or change of title, affecting the interest of the assignee.

The insured cannot sue, because he has so acted as to forfeit the policy. The assignee cannot sue, for he was not a party to the contract originally. In its nature the policy was only assignable so as to pass an equitable interest to the assignee. Even, as in this case, where the assignment was made with the consent of the company, the assignee cannot sue for a breach in his own name. *Jessel vs. Williamsburg Ins. Co.*, 3 Hill, 88.

The assignment was made with the consent of the company ; but the condition of forfeiture, upon alienation, without the consent of the company, was still applicable to the assignee, as well as to the insured. The company did not waive the effect of the breach of the condition.

The insured testified that he thought that he informed the secretary

of the company of the sale after it had been made, and that he would bring the policy and have it transferred to the purchaser, and the secretary replied, "all right."

The secretary testified positively that he never heard of the sale until after the loss. The weight of testimony is decidedly in favor of the company, that no information of the alienation was communicated to its officers. The insured had no distinct recollection of the fact; and he certainly would have remembered if the communication had been made.

But this information, if given, was not a compliance with section fifteen of the charter. That section made the policy void upon alienation, and required its surrender to the company; but it was provided that the grantee or alienee, to whom it may have been assigned, might have it confirmed, with the consent of the directors, within thirty days after the alienation, by giving security to their satisfaction for the payment of the unpaid premium note.

The policy was forfeited as to the insured party, by the act of alienation; and the communication of the fact, after forfeiture, could not revive it. Nor could it be a waiver. To avoid the consequence of a sale, under this section, the knowledge of the intention to sell should be brought home to the company, before the forfeiture has been absolutely accomplished; or if, after alienation, notice is given of it, the proviso of the section must be complied with, by the alienee, unless the directors dispense with the security. Of this, there is no proof.

The confirmation under this section is for the benefit of the alienee, and not for the benefit of the party who has lost all his rights.

Counsel for appellee have referred to a number of authorities, in favor of the position, that the alienation was not of such a character as to render the policy void. In *Stetson vs. Mass. Mut. Fire Ins. Co.*, 4 Mass., 330, the article in the policy did not declare that it should be void upon alienation. The court held the articles imparted a continuance of the contract notwithstanding alienation. In *Strong vs. Man'f's Ins. Co.*, 10 Pick., 40, the policy did contain the provision that if the property should be sold or conveyed, the policy should be void. The sale was made by the act of the law, and without the assent of the insured, and was mortgaged when the insurance was effected. It was held that the insurable interest was not divested, by sale, on execution of the equity of redemption, so long as the right to redeem continued. Besides, the language of the condition might properly be construed to mean a voluntary sale, and not a forced sale, under the law.

In *Power vs. Ocean Ins. Co.*, 19 La., 28, after the sale the property reverted, by reason of the non-payment of the purchase money.

In *Trumbull vs. Portage County Mut. Ins. Co.*, 12 Ohio, 305, there was a mere agreement to sell without any conveyance.

Tittmore vs. Vt. Mut. Fire Ins. Co., 20 Vt., 546, was a conditional sale only. The assured conveyed the property, and at the same time took back a deed, to be void upon the payment of so much money; but the grantee in the last deed never agreed to pay the money. In *Lane vs. Me. Mut. Fire Ins. Co.*, 12 Me., 44, the assured took back the goods sold, before the loss. The court in effect decide that there was no alienation, but term the pretended purchaser a mere tenant at will.

The authorities cited do not sustain the position taken in behalf of appellee.

We think the policy sued on is void; and the judgment must be reversed, and the cause remanded.

Judgment reversed.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1870.

Appeal from Peoria County.

THE COMMERCIAL INS. CO., *Appellant*, }

vs.

HENRY IVES, *et al.*, *Appellees*.* }

The policy provided that if the insured failed to state his true title to the property, or if the same was not expressed in the policy in writing, or if there was, or should be, any prior or subsequent insurance on the property, without the consent of the company, then the policy should be void and of no effect. The policy also contained the following provision: "It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."

*Decision rendered Jan. 25th. 1871.

The appellees applied to Holmes, an agent of another company, who was familiar with the property, and had procured all the policies upon it, at the time the insurance was effected, except one, to get more insurance. He wrote to Folsom, a local agent for appellant, who wrote back to Holmes to make out an application, with a diagram and description, and that he would forward it to the company. Holmes, without further communication with appellees, wrote the application, and signed the names of the appellees to it, making comments under the head of "remarks of agent," and signing his own name as "solicitor." This application he sent to Folsom, who forwarded it to the company. The company thereupon sent the policy to Folsom, who forwarded it to Holmes, and he delivered it to the appellees, who paid the premium, which he forwarded to Folsom. Holmes had previously obtained a policy in the same manner, through Folsom, from the appellant.

The application stated the title "Fee," and that there was then other insurance on the property, in two companies. The title was a bond for a deed, and the appellees then had policies in two other companies besides those mentioned.

The company issued this policy, relying entirely upon its knowledge of the facts, and dispensed with any information from the assured. In such case it is precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same.

The issuing of this policy as a valid policy, and taking the premium for it as such, was a representation that the policy was then valid, and the company are estopped by law to say or show the contrary. It is an estoppel *in pais*.

A device of mere words cannot, in a case like this, be imposed upon the view of a court of justice in the place of an actuality of fact, and make this company and its agents the agents of the appellees, and their doings the doings of appellees.

SHELDON, J.

It is unnecessary to consume time and space in examining in detail the numerous assignments of error on this record, one among them being the refusal of sixteen instructions, and another the giving of eight, as the determining of two or three questions arising under these several stipulations in the policy of insurance sued on, will substantially dispose of the merits of them all. These stipulations, in printed words upon the face of the policy, are as follows: "Applications for insurance, whether written or verbal, must contain or convey a true description and valuation of the property insured, and such description and valuation shall be deemed a part of this contract, and a perpetual warranty on the part of the assured: * * or if the assured or any other person interested, shall have already procured, or shall hereafter procure any other policy of insurance, or instrument purporting to be a policy of insurance, against fire, on the property, or any part thereof, hereby insured, (whether such instrument be valid or binding as contract of insurance upon the parties thereto, or either of them, or not,) without the consent of this company written hereon. * * then, in each and every such case, this policy shall be void and of no effect. * * * If the premises herein insured be held upon lease or upon leased ground, or if the interest of the assured be equitable, or if it be not one of absolute ownership in fee simple, without encumbrance by mortgage or otherwise, it shall be incumbent upon the assured, whether inquired of or

not, so to state the same to this company in writing, giving the true title of the assured, and the extent of the interest insured, and the same be so expressed in this policy in writing, otherwise, this policy shall be void and of no effect. And this policy shall not be construed to protect the interest of any person not named herein as the assured. Goods held on storage must be separately and specifically insured. * * It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance, * * and no part of this contract can be waived, except in writing, signed by the secretary of this company."

The application stated the title "Fee," the other insurance then on the property, "Peoria Fire and Marine, \$3,000, and the Enterprise, of Cincinnati, \$5,000, on mill and machinery." The title was a bond for a deed. The appellees had at the date of the application, two other policies of insurance, one for \$3,000 by the Farmers and Merchants' Insurance Co., and one for \$5,000 by the LaSalle County Mutual Insurance Co., the last being a bankrupt and worthless concern, and its policy expired May 7th, 1868, four days before the fire. All the above-named insurance had been procured by I. P. Holmes, (except the last \$5,000,) who resided at El Paso, where the property burned was situate, and there acted as the agent of the Farmers and Merchants' Insurance Company. The policy in suit recites that appellant insures appellees in the sum of \$3,000, and in writing upon its face reads: "On their frame steam flour mill, building and machinery, and warehouse adjoining, situate in the town of El Paso, Woodford county, Illinois, reference being had to their application and survey, No. 11,510, on file in the office of the company, in Chicago, for a more particular description, and is a part of this policy, and is a warranty by the assured—\$8,000 other insurance permitted." It is now contended by the counsel for the appellant that this policy is null and void, as provided by its terms, because the consent of the company to the prior insurance was not written upon the policy; because the interest in the property insured was equitable, and the assured did not so state the same in writing, giving his true title and extent of interest, and the same was not so expressed in the policy in writing, and because of the falsity of statement in the application.

From the evidence it appears that Holmes was familiar with this property. The appellees had applied to him, an insurance agent, to

get \$6,000 more insurance on it. He writes to one Folson, at Bloomington, general agent of the Bloomington Insurance Company, and local agent for appellant, who issued policies himself in ordinary cases, but not on special hazards, as this was. He writes back to Holmes: "You may make out an application for Ives Bros. in the Commercial, and give a correct diagram and full description of the mill, &c., also how the furnace is situated, and I will forward to the company for approval or rejection." Holmes himself, without any communication with appellees, wrote the application, signed the name of H. & E. Ives to it, and sent it to Folson; he forwarded it to the appellant, at Chicago, who thereupon made the policy in suit, forwarded it to Folson, who in turn endorsed it in a letter to Holmes, saying "enclosed you will find policy in Commercial Insurance Company, which you will deliver to Messrs. H. & E. Ives, and collect premium and report to me. In making charges for commission, you must fix it so I won't lose anything, &c." Holmes drew a diagram on the back of the application, and made the following indorsement upon the application under the head of "remarks of agent": "I cannot give any better description of the premises than I have done, as I am not very skillful at platting. However, this is all that is required of me by other companies, having placed the entire amount on it. I consider it a very good risk of the class to which it belongs. The owners are our best men, careful and reliable. I. P. Holmes, Solicitor."

Holmes delivered the policy to the appellees, they paid to him the premium, \$180, and he forwarded it to Folson. Holmes had obtained in the same manner, through Folson, a previous policy of insurance from appellants. The company, then, issued this policy relying entirely upon its knowledge of the facts, and dispensed with any information from the assured. In such case it is precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same. *Atlantic Ins. Co. vs. Wright*, 22 Ill., 462. In reference to a similar provision in a policy which made it null and void unless the consent of the company to other insurance should be in writing and indorsed on the policy, this court, in *N. E. Fire and M. Ins. Co. vs. Schuttler*, 38 Ill., 168, say: "The agent of plaintiff states the assured mentioned two offices in which he had effected insurance, but the agent did not enter them in writing on the policy, as he was bound to do. For this neglect the assured should not suffer." Anything required by the policy to be done by the appellees, after it was delivered to them, to make it available, they would be

held to perform. But the matter set up in avoidance of this policy, are acts and omissions, and those, too, of the company's agent, which had taken place before the policy was delivered, which made it an invalid policy at the time it was delivered. Now, the issuing of this policy as and for a valid policy, and taking the premium for it as such, was a representation that the policy was then valid, and the company are estopped by law to say or show the contrary. It is an estoppel *in pais*. When a party, either by his declaration or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person. This is a clear rule of law. Declaring a note to be good to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor. *Watson, ex'r, vs. McSaren, 19 Wend., 557.* No declaration by order could have been a stronger representation that this was a valid policy than the conduct of the appellant. But it is urged that the last stipulation above recited makes Holmes appellees' agent—that they so agreed.

There is no magic power residing in the words of that stipulation to transmute the real into the unreal. A device of mere words cannot in a case like this be imposed upon the view of a court of justice in the place of an actuality of fact, and make this company and its agents the agents of the appellees, and their doings the doings of the appellees.

But the general language of that provision was not framed in view of any such case as this. It contemplates the case where some other person has procured the insurance to be taken by the company, upon whose information or conduct it depended. Here the company itself alone took this insurance; no one else procured them to take it.

Believing these views essentially dispose of all the material questions presented to our consideration, and show the propriety [of] the action of the court below in giving and refusing instructions, and overruling the motion for a new trial, the judgment of the court below is affirmed.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

Appeal from General Term, Supreme Court, Second Judicial District.

SAMUEL PINDAR, ASSIGNEE, &C., *Appellant*,*vs.*THE RESOLUTE FIRE INS. CO., OF THE CITY
OF NEW YORK, *Resp'ts.**

The appellant offered to prove that before the issue of the policy in suit, a policy issued by another company to the plaintiff's assignor, on his stock, "such as is usually kept in country stores," contained in the store in question, was mailed to the defendants with the request to issue their policy on the stock in the same store to the amount of \$3,000, in the language of and just like the policy sent, and that the wording should be followed exactly as in that policy; and that in response to that request, the defendants sent the policy in suit.

This evidence was properly rejected: First, because the facts offered to be proved would not, if established, have justified or sustained an inference or finding by the jury that the policy sent was intended as a compliance with the request; second, had the offer been to prove by oral evidence that the parties to the contract intended the policy in suit to be co-extensive with the policy sent, such evidence would have been wholly inadmissible.

Where the policy, as in this case, expressly declares that only goods not hazardous and hazardous are insured, and that the keeping of extra hazardous, or specially hazardous goods on the premises shall avoid the policy, and such language has a settled meaning, parol evidence tending to show a different understanding or agreement, preceding or contemporaneous with the issuing of the policy, is inadmissible.

The evidence was not admissible for the purpose of showing notice to the defendant that the plaintiff's assignor kept in the store such merchandise as was usually kept in country stores, and that consequently it insured the goods in the store as it was. That notice was not material, so long as defendant did not accept the risk as offered, or insert in the policy its permission to keep the prohibited goods.

The plaintiff offered to prove that neither the assured or the plaintiff discovered the difference between the wording of this policy and that of the policy sent the company, until after the fire. This fact could not change the construction of the instrument. The failure of the insured to read the policy, could not enlarge the liability, which it imposed upon the defendant. The evidence was, therefore, clearly immaterial for the purposes of this action.

This action is brought upon a policy of insurance, issued by defendant to Alfred Pindar, and by him assigned to the plaintiff, after the loss occurred. The policy insures the merchandise hazardous and not hazardous, contained in the store of the insured, at Pindar's

* Decision rendered Dec. 19th. 1871.

Mills, Dutchess county. This case has been once before the court of appeals, 38 N. Y., 366, where the same facts appeared. The only questions raised were those arising upon offers of evidence by the plaintiff, which were rejected by the court, and plaintiff non-suited. These questions are set forth fully in the opinion.

RAPALLO, J.

When this case was before the late court of appeals, on the appeal of the defendants, 38 N. Y., 366, it was decided that the terms "not hazardous" and "hazardous", employed in the policy, had a precise meaning, clearly defined by the policy itself, and did not include articles mentioned in the policy as "extra hazardous", and "specially hazardous", and that turpentine being one of the articles named in the policy as "extra hazardous", the keeping of that article in the plaintiff's store was a violation of the express terms of the policy, and fatal to a recovery thereon. Also, that evidence that turpentine was usually kept in country stores, was inadmissible for the purpose of explaining or enlarging the policy, the contract being specific.

That decision disposes of all the questions in the case except those which arise upon the offers of additional evidence, made by the plaintiff on the second trial, and rejected by the court.

The first of these offers was to prove that before the issue of the policy in suit, a policy issued by the Kings County Fire Insurance Company to the plaintiff's assignor, on his stock, "such as is usually kept in country stores," contained in the store in question, was mailed to the defendants, with the request to issue their policy on the stock in the same store, to the amount of \$3,000, in the language of, and just like the Kings County policy, and that the wording should be followed exactly as in that policy; and that in response to that request, the defendants sent to the plaintiff's assignor the policy in suit.

This evidence must have been offered for the purpose of laying the foundation of a claim or argument on the part of the plaintiff, that by sending the policy, in response to this application, the defendant assented to and assumed to comply with the request made of it, and that it therefore treated the language of the policy sent, as synonymous with that of the Kings County policy. In other words, that the facts offered to be proved amounted to an admission by the defendant that both policies meant the same thing. For no other purpose can the evidence have been material or relevant.

The evidence was properly rejected, for two reasons. First, because the facts offered to be proved, would not, if established, have justified

or sustained an inference or finding by the jury that the policy sent was intended as a compliance with the request made by the plaintiff's assignor. The wording of the Kings County policy was sufficient, as was held in the case of *Pindar vs. The Kings County Ins. Co.*, 36 N. Y., 648, to cover any and every description of goods usually kept in country stores, embracing extra hazardous as well as hazardous, if proved to be usually kept in such stores. The request was to follow exactly the wording of that policy. So far from doing or attempting to do so, the defendant sent a policy worded in an entirely different manner, not at all resembling the policy sent as a precedent, but on the contrary expressly restricting the insurance to the two classes of goods defined as hazardous and not hazardous. This was, in effect, a refusal to grant as comprehensive a policy as the one applied for, and must have been so understood by any person of ordinary intelligence, on a comparison of the two policies.

But in the second place, had the offer been to prove by oral evidence that the parties to the contract intended the policy in suit to be co-extensive with the Kings County policy, such evidence would have been wholly inadmissible. Evidence of surrounding circumstances, and other parol evidence is in some cases admissible to show the meaning of language employed in a contract, or the sense in which it has been used, but never to show the intent of the parties as contradistinguished from what the words express; and when the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. Where the policy, as in this case, expressly declares that only goods not hazardous and hazardous are insured, and that the keeping of extra hazardous, or specially hazardous goods on the premises shall avoid the policy, and such language has a settled meaning, parol evidence tending to show a different understanding or agreement, preceding or contemporaneous with the issuing of the policy, is inadmissible. All such understandings are merged in the written instrument, and neither party can be permitted to prove that the instrument does not mean what it says.

The evidence was not admissible for the purpose of showing notice to the defendant that the plaintiff's assignor kept in the store such merchandise as was usually kept in country stores, and that consequently it insured the goods in the store as it was. That notice was not material, so long as defendant did not accept the risk as offered, or insert in the policy its permission to keep the prohibited goods. *Barrett vs. The Union Mut. Ins. Co.*, 7 Cush., 175, 180; *Lee vs. Howard Co.*, 3 Gray, 583, 592. The policy gave notice to the insured, in

plain language, that so long as the prohibited goods were upon the premises, the policy was not operative, and that if he desired to avail himself of the insurance, he must remove them. If he was not content to submit to those conditions, he should have rejected the policy.

The second and only other offer of proof not passed upon on the former appeal, was, that neither the assured or the plaintiff discovered the difference between the wording of this policy and that of the Kings County Insurance Company until after the fire.

This fact could not change the construction of the instrument. The failure of the insured to read the policy could not enlarge the liability which it imposed upon the defendant. The evidence was, therefore, clearly immaterial for the purposes of this action. The fact offered to be proved, explains the conduct of the assured in relying upon a policy so illy adapted to his protection, and adds another to the often recurring instances, in which the object for which insurance is sought, is frustrated by the neglect of the insured to acquaint himself with the provisions of his policy. So long as insurance companies are permitted to deal with the public as they do, by issuing policies encumbered with an infinite variety of complicated printed conditions and stipulations, which the courts are bound to enforce as constituting essential parts of the contract, there is no safety in accepting a policy without the most rigid scrutiny of its contents. It is true that this degree of care is not usual with the mass of mankind, and, through their want of caution, insurers often escape the liability which they were supposed to have assumed, and it would be exceedingly desirable, if practicable, that some system should be devised by which a simpler and more uniform description of policy, and one more readily understood, should be adopted by those carrying on the business of insurance under the protection of corporate franchises. But as the law now stands, there is no restriction upon the insertion in policies of any conditions, not unlawful in themselves, and they must be construed and enforced by the courts, in the same manner as other private contracts, whose provisions are understood and assented to by the contracting parties.

The judgment must be affirmed, with costs.

All concur, except Allen, J., not voting.

Judgment affirmed.

SUPREME COURT OF ILLINOIS,

DECEMBER TERM, 1870.

Appeal from Superior Court of Chicago.

THE LAMAR FIRE INS. CO., *Appellant*,
vs.
 JOHN McGLASHEN, *et al.*, *Appellees*.*

The insurance was for \$15,000, on 20,981.18 bushels of corn, valued at the sum insured, on board the bark "Mary Merrett," from Chicago to Montreal, in funds current in the city of New York, with permission to tranship at Kingston. The policy provided that the beginning of the adventure shall be from and after the lading thereof, and continue until landed at the port of destination; but not to exceed forty-eight hours after the arrival and anchorage or mooring of said vessel at the port of destination aforesaid.

On arriving at Kingston, it was found that four hundred bushels had become so wet and damaged as to require immediate sale, and on arriving at Montreal, the residue was found to be in a heated or heating condition. It was permitted to lie in the vessel three or four days, and was then put in store for the purpose of being handled and dried. The consignees obtained an insurance upon it while in store, paying \$18.00 as premium. A part of it was afterwards sold at private sale, and the residue at auction. The appellees in their account included the expense of handling the grain, of insuring, and of storage and drying.

An incorrect measure of appellants' liability was adopted at the trial. The basis of the verdict was the difference between the market price of the sound and the market price of the damaged corn, including all the particular charges above mentioned. That difference may give the amount of appellees' loss; but it is not the amount appellant is liable to pay; because, first, it would make the market price of the corn the basis of appellant's liability, when the true basis is the valuation in the policy; and it would involve the insurer in the rise and fall of the market, with which he has no concern.

When the corn arrived at the port of destination, two points were to be ascertained: first, the amount of the depreciation in value it had suffered; second, the amount which the insurers ought to pay in respect thereof. The first could be ascertained by simply comparing the price for which the corn would have sold in the market, had it arrived there sound, with the price for which it might have sold arriving there damaged. The object of comparing the proceeds of the sound and damaged sales, is not to ascertain the *direct amount* of the appellees' loss, but its *relative amount*. When this is ascertained, the liability of the insurance company is ascertained, for they pay the same proportional part.

There is a certain class of charges which are to be borne by the underwriter, though not a part nor a direct consequence of the sea-damage. Sales by auction are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the insurer has to pay. There may be other modes. The question in all such cases is, was that expense reasonable

* Decision rendered Jan. 25th. 1871.

and proper for the purpose of ascertaining the amount of the loss. If it be, then it is a part of the loss.

The amount paid for insurance, while retaining this corn in store, was not reasonable or proper, and under the rules laid down as to the mode of ascertaining the quantum of damage, there can be no reason shown to support the charge for storage. The quantum of injury should be ascertained immediately, or within a reasonable time. The storage was not for that purpose, but for the purpose of securing a rising market.

The items for surveys, inspection and sale at auction, may, under the circumstances above indicated, be properly chargeable as a part of the loss.

MCALLISTER, J.

This was an action of assumpsit, brought by appellees against appellant, upon a contract of marine insurance, bearing date the 1st May. A. D. 1866, whereby appellant insured under policy No. 155, for account of appellees, \$15,000 on 20,981.18 bushels of corn, valued at the sum insured, on board of the bark "Mary Merrett," from Chicago to Montreal. Loss, if any, payable to the Bank of Montreal, in funds current in the city of New York, with permission to tranship at Kingston on standard barges or vessels. Premium of insurance \$285.60, acknowledged to have been received by the agents of appellant.

The policy referred to provides that the beginning of the adventure shall be from and after the lading thereof, and continue until landed at the port of destination; but not to exceed forty-eight hours after the arrival and anchorage or mooring of said vessel at the port of destination aforesaid. The bark left the port of Chicago on the 30th of April, 1866, but in consequence of a severe storm, she was obliged to return about the 3d of May. After a survey, and with consent of appellant's agent, she proceeded again. In the course of the voyage the water got in, and when she arrived at Kingston, about the 20th, it was found that four hundred bushels had become so wet and damaged as to require an immediate sale.

The residue was receipted in apparent good order, transhipped upon another barge, and taken to Montreal, arriving there the 28th or 29th of May. On the 30th it was inspected by an authorized inspector, and declared rejected. It is an undisputed fact that it was then in a heated or heating condition.

It was under the care of the consignees, but permitted to lie in the vessel some three or four days and then put into store for the purpose of being handled and dried. Consignees obtained an insurance upon it while in store, paying \$18.00 as premium. A few days before the 4th of July, 1866, one thousand bushels of it were sold at private sale, at 56c, and on the 4th the residue was sold at auction, different lots bringing different prices.

These being the main facts, it is now necessary to determine whether the proper measure of appellant's liability was regarded upon the trial. Appellees' statement of account between them and appellant, sufficiently shows what that measure was. It was arrived at in this manner: The market price of sound corn at Montreal at the date of arrival of cargo was estimated at 56c per bushel. Appellees find what the whole cargo would amount to at that price. They then deduct from that amount the net proceeds of all the corn sold at the times and in the manner above stated; but in arriving at the net proceeds of the latter they deduct \$1,106.96 as the charges for handling it, and among the items making up that amount, is the \$18 paid for insurance on it while in store, (although the risk of appellant did not extend beyond forty-eight hours after its arrival at Montreal,) and \$823.77 for storage and drying; and after all these, deducting the balance claimed to be due appellees, according to their own statement, was \$3,742.96. The jury having no other data, found a verdict for \$6,022.29, and the court below refused to set it aside, and grant a new trial. We have been unable, after the most careful examination of the testimony, to resort to any proper calculation by which the amount of this verdict can be sustained, and no theory has been suggested by which it can be sustained. Appellees prepaid to the amount of balance due according to their statement given in evidence the word "gold," and it has been suggested that the jury must have allowed the premium on gold in 1866. If so, it was wrong, because by the terms of the policy the amount insured is payable in funds current in the city of New York.

It is apparent that an incorrect measure of appellants' liability was adopted at the trial. The basis of the verdict was the difference between the market price of the sound and the market price of the damaged corn, including all the particular charges above mentioned. That difference may give the amount of appellees' loss; but it is not the amount appellant is liable to pay; because, first, it would make the market price of the corn the basis of appellant's liability, when the true basis is the valuation in the policy, and it would involve the insurer in the rise and fall of the market, with which he has no concern.

The extent of loss the appellees sustained on this corn by sea-damage is one thing, and the amount which the insurance company is bound to pay is quite another. Accordingly, when the corn arrived at the port of destination, sea-damaged, two points were to be ascertained, first, the extent of the depreciation in value which it had suffered; secondly, the amount which the insurers ought to pay in respect thereof. The first point could be ascertained by simply com-

paring the price for which the corn would have sold in the market had it arrived there sound, with the price for which it might have sold, arriving there damaged.

But the object of comparing the proceeds of the sound and damaged sales, for the purpose of indemnity under the policy, is not to ascertain the *direct amount* of the appellees' loss, but its *relative amount*—the proportion which it bears to the price at which the corn would have sold if sound—the question being not whether the depreciation amounts to any fixed sum, but whether it amounts to one-half, one-third, or two-thirds, or any other proportion of the sum for which the corn would have sold if sound; whether, in short, the property was one-half, one-third, or two-thirds the worse for the sea-damage. When this is ascertained, the liability of the insurance company is ascertained also; for they pay the same proportional part.

The corn in question was valued in the policy. It was not claimed that there was more than a partial loss. The mode of measuring the liability of the insurance in such case is laid down in the leading case of *Lewis vs. Rucker*, 2 Burr. 1,167, by Lord Mansfield. "Where," said he, "an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantum of damage; but if you can fix whether it be a third, a fourth or a fifth worse, the damage is fixed to a mathematical certainty." And this, he says, is to be done by the price "at the port of delivery."

In *Usher vs. Noble*, 12 East. 647, Lord Ellenborough stated the rule thus: "The difference between the sound and the damaged sales affords the proportion of loss in any given case, i. e., it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against. When this is ascertained, it only remains to apply this liquidated proportion of the loss to the standard by which the value as between the assured and the underwriter is calculated, (i. e., the prime cost or value in the policy,) and you have the one-half, the one-fourth, or the one-tenth of the loss in terms of money." The rule by which to calculate a partial loss in such a case, as this at bar, is the difference between the respective *gross* proceeds of the same article when sound and when damaged, and not the net proceeds. *Johnson vs. Sheldon*, 2 East., 581, which case decides that the underwriter is not to bear any loss from fluctuations of markets, or port duties or charges after the arrival of the goods at their port of destination.

It is said in 2 Arnold on Ins., 969, that "by the gross produce of the sales is meant the market price at which the merchant, after pay-

ing freight, duty, and landing charges, can sell the goods to the consignee or purchaser, at the port of arrival," and "that by the term net proceeds is meant the gross proceeds, deducting freight, duty, and landing charges." *Id.*, 970.

It is claimed by appellant's counsel that the charges for handling this cargo, after its arrival, were such as could not be included in the amount of indemnity which appellant is liable to pay.

There is a certain class of charges which are to be borne by the underwriter, though not a part nor a direct consequence of the sea-damage. Sales by auction are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the insurer has to pay. There may be other modes. The question in all such cases is, was that expense reasonable and proper for the purpose of ascertaining the amount of the loss. If it be, then it is a part of the loss. In *Muir vs. United Ins. Co.*, 1 *Caines' R.*, 49, the court said, "Had the sale at auction been to ascertain the injury the cargo had received, and limited to such parts as were damaged, it would have been a reasonable charge; but that appears not to have been the object or effect of the auction," and it was there held that the charges attending the auction could not, for that reason, be considered as a loss to be borne by the underwriters. 2 *Parsons on Mar. Ins.*, 399; 2 *Arnold*, 973. The principle being, that the charges, in order to be considered a part of the loss, must be reasonable and proper for the purpose of ascertaining the amount of the loss, the inquiry as to a particular charge being of that character, might involve questions of fact; but when the facts are undisputed, it is the duty of the court to determine whether such extra charges were necessary to ascertain the partial loss, and therefore formed a part of it. That the amount paid for insurance while retaining this corn in store, was not reasonable or proper, is quite clear, and under the rules laid down as to the mode of ascertaining the quantum of damage, there can be no reason shown to support the charge for storage. The quantum of injury should be ascertained immediately, or within a reasonable time. The storage was not for that purpose, but for the purpose of securing a rising market. The condition of the grain for all the particular purposes of a public sale, could have been ascertained by inspection or survey.

[If] it was stored for the purpose of a more advantageous market, or any purpose other than that of a reasonable and proper mode of ascertaining the extent of the injury, the appellant would not be liable to that expense as a part of the loss. For the legitimate object of

determining the extent of the injury, it was immaterial whether the market, at the time of the arrival was rising or falling. Lord Mansfield, in *Lewis vs. Rucker*, *supra*, said: "Whether the price there (the port of delivery,) be high or low, in either case it equally shows whether the damaged goods are a third, a fourth or a fifth worse than if they had come sound."

The items for surveys, inspection and sale at auction may, under the circumstances above indicated, be properly chargeable as a part of the loss.

The court below having, by instructions to the jury, sanctioned a measure of liability on the part of the appellant different from that above enunciated, the judgment must be reversed and the cause remanded.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1871.

Appeal from Superior Court of Chicago.

ROSSELL H. HOUGH, *Appellant*,

vs.

ÆTNA LIFE INSURANCE CO., *Appellee*.*

Wallis, a local agent of the company, as principal, executed a bond to the company, with appellant as surety, conditioned that he should pay over to the company all moneys he might receive. Raymond was general agent of the same company, and bound by his contract to pay over all moneys received. Wallis failed to pay over certain amounts collected for the company, and Raymond, in the general management of the affairs of the company, paid the money, taking from Wallis his promissory notes, to be paid in a few days. These notes were not surrendered before the judgment.

The principle of subrogation has special application to the facts of this case. The rule is, that where the person who pays the debt, stands in the situation of a surety, or is compelled to pay, for the protection of his own interests, then in either case, the substitution will be made. A mere stranger who pays the debt of another, will not be subrogated to the creditor's rights.

The objection that notice was not given to the surety, cannot be maintained. So far as the rights and remedies of the insurance company are concerned, appellant and Wallis are both principals. The appellant was primarily liable for any defalcation.

* Decision rendered Sept. 28th, 1871.

tions; and the company was not compelled to sue Wallis before resorting to its remedy against the surety. Where two persons execute a bond, one as principal and the other as surety, one is equally bound to the obligee as the other. The default did not lie within the peculiar knowledge of the opposite party. In such cases no notice is necessary before suit.

THORNTON, J.

Wm. J. Wallis, as principal, and appellant, as surety, executed a bond to appellee, in the penal sum of one thousand dollars, with the condition annexed that Wallis, as agent of the company, should pay over all moneys, less his commission, which he might receive for the company. The defalcation of Wallis amounted to \$462.63, and judgment was rendered for the penalty of the bond to be discharged upon the payment of the damages. One Raymond was the general agent of the company, and Wallis was a local agent. It appears from the evidence that Raymond was bound by his contract with the company to pay over all moneys received, and in the general management of the affairs of the company, he had paid the amount of money retained by Wallis. It is further developed by the testimony, that Wallis was under obligations to make monthly returns of all collections, and when he failed to do so, Raymond took from him promissory notes to be paid within a few days, which had not been surrendered. Three questions arise upon this record: 1st. Was the settlement of the delinquencies of the local agent, by the general agent, under the circumstances, a payment and discharge of the bond? 2d. Is the surety released by reason that no notice was given to him of the defalcation of his principal? 3d. Should the notes have been surrendered before judgment on the bond? By the terms of his agency, Raymond was responsible for all premiums. His reputation was involved in the promptness with which he paid over the collection. His position could not be maintained without the regular monthly payment of all sums received by way of premiums. He was thus compelled to make payment.

The principle of subrogation has special application to the facts of this case. The rule is, that where the person who pays the debt, stands in the situation of a surety, or is compelled to pay, for the protection of his own interests, then in either case, the substitution will be made. A mere stranger who pays the debt of another, will not be subrogated to the creditor's rights. We cannot regard Raymond as a volunteer, neither was he the co-surety of appellant. The facts of the case do not indicate that it was intended that Raymond should be co-surety. As general agent, he was liable to the company for deficits of other agents, before the appointment of Wallis. His

obligation was not only prior to, but independent of, the obligation assumed by the bond. His liability arose, not alone from his agreement, but from his position; his relation to the company, and his right to appoint agents. These are matters of inference from the evidence, so far as the record discloses. We cannot determine that the company had the bond of Raymond, or the nature of the particular contract. He had the right to appoint agents, and it was his duty to uphold them in their integrity. Raymond testified as follows: "I have paid the company amounts or deficiencies of Wallis. I have to pay that. My contract is such that I have to do it." This was all the evidence from which it can be inferred that he was the surety of Wallis. He was not a party to the bond. He made no contract at the time of its execution. What is suretyship? It is an accessory agreement, by which one person binds himself for another already bound. No application can be made of this principle to the facts. Raymond's liability to the company was distinct from, and anterior to the liability of the obligor's, to the bond.

The second objection, that notice was not given to the surety, cannot be maintained. So far as the rights and remedies of the insurance company are concerned, appellant and Wallis are both principals. Hough was primarily liable for any defalcations; and the company was not compelled to sue Wallis before resorting to its remedy against the surety. Where two persons execute a bond, one as principal and the other as surety, one is equally bound to the obligee as the other.

In the cases to which reference has been made, there was a different relation between the parties. In *White vs. Walker*, 31 Ill., 422, the question arose as to the necessity of notice to a guarantor, before the commencement of suit against him. The liability was secondary, dependant on the default of the lessee. Under such circumstances, this court held that it was but reasonable that the guarantor should have notice of the default before suit, so that he might make payment. In the case of *Babcock vs. Bryant*, 12 Pick., 133, the undertaking of the defendant was collateral only: the relation of guarantor and guarantee existed, and the court held that in such case there must be a reasonable notice.

In this case the surety did not agree to do something upon the performance of some act of his principal. The undertaking of the surety was primary. He stipulated for no notice: but agreed to do a certain thing in a certain specific event. This event, the failure of the principal to pay over all moneys collected, might have been known

to him. He could easily have obtained the requisite information. Ordinary inquiry would have afforded him a knowledge of the conduct of the principal. The default did not lie within the peculiar knowledge of the opposite party. In such cases no notice is necessary before suit. In *Orme vs. Young*, 3 E. C. L., 35, the plaintiff sued upon a bond executed by his son and ten securities for twenty-two thousand pounds, payable by installments of one thousand pounds half-yearly, until nine thousand pounds should be paid, at which time the residue was to be paid. Default was made in the payment of the residue of the principal sum, and continued so until the principal became a bankrupt. No notice had been given to the sureties of this default. Gibbs, Ch. J., in delivering the opinion of the court, said: "A neglect to give notice to the surety that the debtor has made default, does not discharge him." See, also, *Taylor vs. Bank of Kentucky*, 2 J. J. Marshal, 564. *Pittsburg, Ft. Wayne & Chicago Railway Co. vs. Schaeffer*, Penn. St. R., 300.

It was, however, error to render judgment on the bond without a surrender of the notes of Wallis. It is true that Raymond terms them "cash tickets," but the form given in the record is that of an ordinary note for money. It is wrong in every view to permit a creditor to retain notes, and also have judgment for the same indebtedness. So far as appears from the record, these notes are still in the possession of Raymond, or he may have transferred them to third parties, and the debtor may be compelled to pay them. They should be surrendered on the trial, or proof made that they had been given up, so that the debtor is released from his double liability. If the notes have been received in actual payment of the defalcation, then the liability upon the bond is discharged. This fact should be inquired of by the jury.

The judgment is reversed, and the cause remanded.

Reversed.

COURT OF APPEALS OF NEW YORK.

Appeal from General Term, Supreme Court, Second Judicial District.

ELLEN E. MALLORY, *Respondent*,

vs.

TRAVELERS INS. CO., *Appellant*.*

By the policy, the company agreed to pay the sum insured after proof that the insured shall have sustained personal injury, caused by any accident, if such injuries shall occasion death within three months; and if he shall sustain any personal injury which shall not be fatal, but shall totally disable him from business, then, on satisfactory proof of such injury, compensation shall be paid to him, etc., "provided, always, that no claim shall be made under this policy by the said insured, in respect to any injury, unless the same shall be caused by some outward and visible means, of which proof satisfactory to the company shall be furnished."

The policy was procured by the deceased, and he paid the premium, making the loss payable to the plaintiff. This was, in effect, a policy procured by him upon his own life, and an assignment thereof.

The insured was last seen alive, walking toward a railroad bridge, which was used, to a considerable extent, by pedestrians, for crossing the stream. The body was found, a few days afterwards, in a pond near the bridge. There was a wound upon the head, and a break in the corresponding part of the hat.

From the facts, it appeared either that the death was caused by an injury received by an accident, or by the suicidal act of the deceased. The presumption is against the latter.

It was for the jury to say how the wound was caused, and to determine its effect upon the question, whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life.

The insured was a canvasser for the company. The president had once told him that he must be cautious, as the company did not wish to insure insane or intemperate persons. Upon two occasions, several years before making his application, he had been insane. In his application he did not state this fact, but did state that there were no circumstances, which rendered him peculiarly liable to accident.

The general conversation with the president had no tendency to show a fraudulent concealment of material facts upon making the application. It did not convey the idea that the company regarded those who had been a long time before insane, as peculiarly liable to accident.

The terms "outward and visible means," applied only to injuries not causing death in three months, and to such only as entitled the deceased to certain sums from the company during their continuance.

If a wound, produced by an accident, did not cause his death, but did cause him to fall into the water, where he died from drowning, then his death was accidental.

The judge was right in charging that if the deceased did not conceal any fact, which in his own mind was material in making the application, the policy was not void.

* Decision rendered Dec. 12th. 1871.

This action is brought upon an accident policy of insurance, issued upon the life of W. S. Mallory, for the sum of \$2,000, for the benefit of, and made payable to, plaintiff. By the policy, the defendant agreed to pay the sum insured, "within ninety days after sufficient proof, that the insured at any time within the term of this policy, shall have sustained personal injury, caused by any accident within the meaning of this policy and the conditions hereunto annexed, and such injuries shall occasion death within three months after the happening thereof." "And if the assured shall sustain any personal injury, which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of business, then, on satisfactory proof of such injury, compensation shall be paid to him," etc. "Provided, always that no claim shall be made under this policy, by the said insured, in respect of any injury, unless the same shall be caused by outward and visible means, of which proof satisfactory to the company shall be furnished," etc. The facts pertinent to the questions discussed and disposed of, appear in the opinion.

GROVER, J.

The question whether the plaintiff had an insurable interest in the life of the deceased, does not arise in this case. The insurance was upon the life of W. S. Mallory. The policy was procured by him, and he paid the premium therefor, and made the loss payable to the plaintiff, (his daughter) or legal representatives. This, in effect, was a policy procured by him upon his own life, and an assignment thereof to the plaintiff. *Grosvenor vs. The Atlantic Fire Ins. Co.*, 17 N. Y., 391; *Rawls vs. American Mutual Ins. Co.*, 27 N. Y., 282. There was no error in denying the defendant's motion for a non-suit. No ground for such motion was stated, and in such a case the well settled rule is, that there is no error committed by denying it. Although there may be a defect in the plaintiff's proof, if the defect was such that it might have been supplied if pointed out upon the motion. But there was no such defect. The proof shows that deceased had been staying at his brother's, at Bridgeport, Conn., for about a week; that he left the house on Sunday, and was last seen alive on that day, walking toward a railroad bridge over a culvert, across a stream emptying into the sound, where the waters of the sound set, to some extent, into the land, and up the stream at high tide; that this bridge was used by pedestrians to cross the stream, to a considerable extent; that the body of the deceased was found in the pond not far from the bridge,

in a few days thereafter. The policy was one embracing cases only where the death was caused by an injury received from an accident. From the facts above stated, it appeared either that the death was caused by such an injury, or the suicidal act of the deceased; but the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person. That it resulted from the former cause, was to some extent rendered more probable by the wound upon the head of the deceased, and the break in the corresponding part of his hat. Although this wound might have been made after the deceased was in the water, or while falling in, yet it was for the jury to say how it was caused, and to determine its effect upon the question whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life. The court did not err in charging the jury that the conversation between the president of the company and the deceased had no bearing upon this particular application. It was proved that the deceased, at the time of his death was, and for some time previous to procuring the policy had been, a canvasser for applications for insurance with the defendant. That in an interview with the president, the deceased remarked that he could procure a great number of applications in Newark. To which the president in substance replied, that he must be cautious, as the company did not wish to insure insane persons, or persons of habits of intoxication. This evidence was relied upon by the defendant to avoid the policy, in connection with the facts proved that the deceased, twenty years before making the application, had a severe fever, during which he was more or less insane, but that after recovering therefrom he was sane until three or four years before that time, when he was insane, from what cause did not appear, and was placed for about three months in a retreat for such persons, when he was discharged cured therefrom, from which time to his death he more or less attended to business; was sane, or at most the evidence of a want of sanity was so slight during any portion of this period, as hardly warranted the submission of any question thereon to the jury. That the deceased did not state to the company upon making application for the policy, that he ever had been insane, but did state there were no circumstances which rendered him peculiarly liable to accident. This general conversation with the president some time before the application, had no tendency to show a fraudulent concealment of material facts, upon making the application. There was no evidence tending to show that he was then insane, or that he had been for some time before, and this conversation did not convey to his mind the idea

that the company regarded those that a long time before had been insane, as peculiarly liable to accidents. The construction put upon the contract in the charge was correct. That construction was that the terms outward and visible means applied only to injuries not causing death in three months, and to such only as entitled the deceased to certain sums from the company during their continuance, as provided by the policy. The part of the charge to the effect that if the wound led to the cause of his death, then it would be an accidental death, could have been understood only in the sense of the wound being produced by an accident, but that this not causing death, did cause him to fall into the water, where he died from drowning, then the death was accidental. So understood, it was entirely correct. The judge was right in charging that if the deceased did not conceal any fact which, in his own mind, was material, in making the application, the policy was not void. *Rawls vs. The American Mutual Life Ins. Co.*, 27 N. Y., 282; *Van Lindeman vs. Desborough*, 14 Eng. C. L., 343; and *Valton vs. National Fund Life Assur. Co.*, 20 N. Y., 32. Cases cited by counsel were cases where false answers were given to inquiries made, and have no application to this case. The counsel was mistaken in his exception to the charge, that if the deceased was insane, so that he could not know right from wrong, that his death in such a condition was an accident that would entitle him to recover. The judge did not so charge. The judge did charge that if his condition at the time was such that he could not distinguish right from wrong, if it was such that he could not be held in his own mind to know that he was doing an act which would produce death, then he was an involuntary agent, and the result of that involuntary act producing death was an accident. This part of the charge was not excepted to. Hence, no question arises thereon for review by this court. The defendant can sustain no injury from the want of a proper exception, even if right in its law, for the reason that there was no evidence tending to show that the deceased did not know that keeping his head under water for a sufficient time would cause his death. It was wholly immaterial whether Lawton ever told Johnson that the deceased was insane, or when he told him so. The defendant could not have sustained any injury from this testimony.

The judgment appealed [from] must be affirmed, with costs.

All concur.

Judgment affirmed.

SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1870.

*Appeal from Superior Court of Chicago.*THE HOME MUTUAL FIRE INS. CO., *App't*,*vs.*ALBERT G. GARFIELD, *Appellee*.*

The objections to the form of the action and the right of the plaintiff to sue, cannot be availed of here. These were raised by demurrer in the court below, and this having been overruled, special pleas were filed. The appellant should have abided by his demurrer, if he desired to preserve the questions, raised by it, to this court.

The insured, in reply to a question in the application, as to what the title to the property was, and whether it was incumbered by mortgage or otherwise, and to what amount, answered, "Fee simple." At that time he had a fee simple title, subject to an incumbrance. The person holding the incumbrance informed the officers of the fact, before the policy was issued, and the incumbrance was mentioned in the policy.

Held, that considering the application and policy together, the answer to the question was, Fee simple; subject to the lien of Reynolds. "There was no concealment of the true character of the title, and consequently no fraud practised."

By the terms of the policy, the company agreed to pay the sum insured, within three months after the loss, and notice thereof, "unless the directors shall, within said three months, determine to rebuild or replace the property destroyed." A notice that the company elected to rebuild, was given to the insured.

Held, that the company merely reserved the right to replace the property, to avoid the payment of the money. Upon the lapse of a reasonable time after due notice to rebuild, without prompt measures being taken for such purpose, the company is liable for the amount of the policy, and interest.

The notice effected no change in the character of the contract, and it was error to instruct the jury that "the company was bound to rebuild the building destroyed, cost what it may."

The charter of the company provided that the directors should not expend in building or repairs more than the sum insured on the premises.

Held, that this was a part of the contract between the parties. Therefore, the disbursement, in rebuilding, of a sum larger than that specified in the policy, would be a violation of the charter.

The policy was for \$5,000. The judgment of the court below for \$8,579, is reversed, and the cause remanded.

THORNTON, J.

This is an action of covenant, upon a policy of insurance, brought

* Decision rendered Jan. 25th. 1871.

by the insured against the company. After the destruction of the property by fire, a notice to rebuild was given, according to the clause contained in the policy.

The objections to the form of the action, and the right of the plaintiff to sue, cannot be availed of here. These were raised by demurrer in the court below, as the declaration set forth at length the policy, and the notice to rebuild. This having been overruled, special pleas were filed. The appellant should have abided by his demurrer, if he desired to preserve the questions raised by it, to this court. *Russell vs. Whiteside*, 4 Scam., 8; *American Express Co. vs. Pinckney*, 29 Ill., 406.

Appellant is a Mutual Insurance Company, and insured the property of appellee to the amount of five thousand dollars. The application and policy contain these words: "Loss, if any, payable to Wm. C. Reynolds, trustee, or order, as his interest may appear." By the policy the company promised to pay the sum insured "within three months next after the property shall be burnt, destroyed or demolished by fire, and notice thereof given by the act, during the time this policy shall remain in force, unless the directors shall within said three months, determine to rebuild or replace the property destroyed." In condition VII annexed to the policy, and a part of it, it is declared that "If the interest in the property to be insured be a lease-hold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void."

Section fourteen of the charter is as follows: "The directors shall settle and pay all losses within three months after they shall have been notified as aforesaid, unless they shall judge it proper within that time to rebuild the house or houses destroyed, or repair the damages sustained, which they are empowered to do in a convenient time, provided they do not lay out and expend in such buildings or repairs more [than] the sum insured on the premises," &c.

It further appears that in reply to the question, What is the title, and whether encumbered by mortgage or otherwise, and to what amount, the answer was, "Fee simple." The proof shows that at the date of the policy, Reynolds held an encumbrance on the property to the amount of ten thousand dollars. It is insisted that the fraudulent concealment of the title rendered the policy void. Campbell, an agent of the company, testified substantially that Reynolds called in the office and said he had been making a loan to Garfield; that Garfield had a policy, but it was not satisfactory; that he desired one in the Home Mutual, and requested him to make a survey of the

building. He made the survey, and then consulted with the vice-president, and wrote the application in the office of the company. Upon cross-examination, he said, "The matter was all talked over between Reynolds and the vice-president." From both the policy and outside information, the officers of the company had full knowledge of the loan and encumbrance. They knew that Reynolds wanted the insurance effected for the better security of the money he had loaned. They knew from the policy itself that there was an incumbrance.

Proof of a fee simple estate accompanied with these explanatory circumstances, would be a compliance with the seventh condition attached to the policy. To permit the company to have the benefit of this stringent provision, with the evidence before us, would be to countenance the perpetration of a gross fraud.

The proof was that the assured party, at the time of the insurance had a fee simple title, subject to an incumbrance. This was mentioned in the policy. The company had notice of it, and should have made further inquiry, or rejected the application. There was not a concealment of the true character of the title, and consequently no fraud practised. This is not like the case of *Illinois Mut. Fire Ins. Co. vs. Marseilles Man'g Co.*, 1 Gill., 236. In that case, the court said, "Neither of the policies or the applications, which are parts of the policies, express that the title of the defendants in error to the land was less than an estate in fee simple, or that the same was incumbered," and therefore they were properly declared void. In this case, the disclosure was sufficient, when the policy informed the company that Reynolds had a lien upon the property.

In determining the meaning and effect of the answer as to the title to the property, we should consider the application and policy together. In this view, the answer to the question as to title and incumbrance was: "Fee simple; subject to the lien of Reynolds." We do not, therefore, think that the policy was void.

It is claimed that the suit was not instituted in proper time, under the charter of the company. We have examined the stipulation of the parties, and do not think this defense can now be made.

All other questions raised may be resolved into one: What is the liability of the appellant? As authorized by the policy, a notice to rebuild was given, and is as follows:

Albert G. Garfield, Esq., Chicago: Dear Sir—In conformity with the provisions of policy No. 5,881, of the Home Mutual Fire Insurance Co., of Illinois, you are hereby notified that the company elects to rebuild the four story frame building formerly situated on the south-

west corner of Franklin and Tyler streets, in the city of Chicago, and occupied as a tinware manufactory, being the same premises insured under the above described policy of insurance and destroyed by fire on or about the 21st day of February, 1868. Every other right existing under the same policy of insurance is hereby expressly reserved. You are hereby requested to furnish at the earliest practicable moment, plans and specifications of the construction of the building, in accordance with the custom of insurance in such cases of loss adjustments.

Truly yours,

I. K. MURPHY, Sec'y.

April 24th, 1868.

It is assumed that this notice changed the policy, changed the entire character of the contract, and that thereby the company agreed to replace the property destroyed, without any reference to the amount of the cost. It is urged that the policy is in the nature of an alternative contract, and that the company, in giving the notice and making the election, made it an absolute contract to rebuild, and having failed to rebuild, became liable for all damages for breach of such contract. The policy is not in the alternative to pay a sum of money or to rebuild the house. The language is "to pay" the sum insured unless the "directors shall determine to rebuild." It is equivalent to saying it will pay a sum certain if it fail to rebuild. The company merely reserved the right to replace the property to avoid the payment of the money. Its liability was for the money, to be discharged by the performance of some other act. This conduct on the part of the company, in giving notice, should be looked upon with disfavor, unless good faith is manifested in all its subsequent proceedings. Upon its determination to rebuild, it should proceed immediately with the work, or be held liable for the insurance. Upon a lapse of a reasonable time after due notice to rebuild, without prompt measures for such purpose, by the company, it is liable for the amount of the policy and interest.

If, then, the notice effected no change in the contract, it was error to instruct the jury that the "company was bound to rebuild the building destroyed, cost what it may."

Section fourteen of the charter, already quoted, is an express limitation, even if there was a contract to rebuild. The assured, by virtue of his policy, became a member of the company, and is presumed to know its charter and by-laws. The charter, by which alone the company has a legal existence, expressly declares, that when the directors shall judge it proper to rebuild, they shall not lay out and expend an amount greater than the sum insured. This is a positive

restriction upon the company, in the expenditure of money. It was a part of the contract known to both parties. Therefore, the disbursement of a sum in rebuilding, larger than the sum specified in the policy, and limited by the law, and agreed to by the contracting parties, would be palpable violation of the charter. This the court ought not to enforce.

As the judgment of the court below was for eight thousand, five hundred and seventy-nine dollars, it is reversed, and the cause remanded.

Reversed.

STATUTE LAWS.

OHIO.

[Continued from June Number.]

SEC. 9. The annual meeting for the election of directors shall be holden at such time in the month of January, as the by-laws of the company may direct; provided, however, that if for any cause, the stockholders shall fail to elect directors at any annual meeting, they may hold a special meeting on some subsequent day for the purpose, by giving thirty days' previous notice thereof in some newspaper in general circulation in the county where the principal office of the company shall be kept; and the directors chosen at any such annual or special meeting, shall continue in office until the next annual meeting, and until their successors shall have been duly elected and qualified.

SEC. 10. The directors shall choose, by ballot, a president from their own number, and shall fill all vacancies that may arise in the board or in the presidency thereof; and the board of directors, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in them by this chapter. They shall also have power to appoint a secretary, and any other officers and agents necessary for transacting the business of the company, paying such salaries and taking such securities as they may judge reasonable; they may ordain and establish by-laws and regulations, not inconsistent with this chapter, or with the constitution and laws of this State and of the United States, as shall appear

them necessary for regulating and conducting the business of the company; and it shall be their duty to keep full and correct records of their transactions, which shall at all times be open to the inspection of the stockholders.

SEC. 11. All policies or contracts of insurance made or entered into by the company, may be made either with or without the seal thereof; they shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary, and, being so subscribed and attested, they shall be obligatory on the company.

SEC. 12. Transfers of stock may be made by any share-holder, or his legal representative, on the books of the company, subject to such reasonable restrictions as the directors may from time to time make in their by-laws, and subject, also, to any provisions of the laws of this State relating to such transfers.

SEC. 13. Whenever any company organized under this chapter shall, in the opinion of the directors thereof, require an increased amount of capital, they shall, if authorized by the holders of two-thirds of the stock, file with the secretary of State a certificate, setting forth the amount of such desired increase, and thereafter such company shall be entitled to have the increased amount of capital fixed by said certificate, and the examination of securities composing the capital stock thus increased, shall be made in the same manner as is provided in section seven of this chapter for capital stock originally paid in.

SEC. 14. No fire insurance company organized under any law of this State, shall make any dividend, except from the surplus profits arising from its business. In estimating such profits, there shall be reserved therefrom:

First—A sum equal to the whole amount of premiums on unexpired risks and policies, which are hereby declared to be unearned premiums.

Second—All sums due the company on bonds and mortgages, bonds, stocks and book accounts, of which no part of the principal nor the interest thereon has been paid during the preceding year, and for which foreclosure and suit has not been commenced, or which, after judgment obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid; and

Third—All interest due or accrued and remaining unpaid for which the company does not hold securities as hereinbefore provided: Provided, that any company may declare dividends, not exceeding ten per

cent. on its capital stock in any one year, that possesses an accumulated fund in addition to the amount of its capital stock, and of such dividend, and all actual outstanding liabilities, equal to one-half the amount of all premiums on risks not terminated at the time of making such dividend. Any dividend made contrary to the provisions of this section, shall subject the company making the same to a forfeiture of its charter, and each stockholder receiving it to a liability to the creditors of such company, to the extent of the dividend received, beside the other penalties and punishments prescribed by law. This section shall not apply to the declaration of scrip dividends by participating companies; but no such scrip dividend shall be paid, except from surplus profits after reserving all sums as above provided, including the whole amount of premiums on unexpired risks. The word "year," wherever used in this section, shall be construed to mean the calendar year.

SEC. 15. No company organized under this chapter shall purchase, hold or convey real estate, except for the purposes and in the manner herein set forth, to-wit:

1. Such as shall be requisite for its convenient accommodation in the transaction of its business; or,
2. Such as shall have been mortgaged to it in good faith, by way of security for loans previously contracted, or for money due; or,
3. Such as shall have been conveyed to it in satisfaction of debt previously contracted in its legitimate business, or for money due; or,
4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts; and it shall not be lawful for any such company to purchase, hold or convey real estate in any other case, or for any other purpose; and all such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the transaction of its business, shall be sold and disposed of within two years after such company shall have acquired title thereto, unless the company shall procure a certificate from the Superintendent of Insurance that the interests of the company will suffer materially by a forced sale thereof, in which event the sale may be postponed for such period as the said superintendent shall direct in said certificate.

SEC. 16. Every person effecting insurance in any mutual company, and also their heirs, executors, administrators and assigns, continuing to be so insured, shall thereby become members of said corporation during the period of insurance, and shall be bound to pay for losses and such necessary expenses as aforesaid accruing in and to said compa-

ny, in proportion to the amount of his deposit note or notes. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portion of such loss, and publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed; and the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the company within thirty days next after the publication of said notice. And if any member shall for the space of thirty days after the publication of said notice, and after personal demand for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss as aforesaid, in such cases the directors may sue for and recover the whole amount of his deposit note or notes, with costs of suit; but execution shall only issue for assessments and costs as they accrue, and every such execution shall be accompanied by a list of losses for which the assessment is made. If the whole amount of deposit notes shall be insufficient to pay the loss occasioned by any fire or fires, in such case the sufferers insured by the said company, shall receive towards making good their respective losses, a proportional share of the whole amount of said notes, according to the sums by them respectively insured; but no member shall ever be required to pay for any loss occasioned by fire or inland navigation, more than the whole amount of his deposit note.

SEC. 17. Every mutual insurance company shall embody the word "Mutual" in its title, which shall appear upon the first page of every policy and renewal receipt; and every stock company shall upon the face of every policy and renewal receipt in some suitable manner, express that such policy or receipt is a stock policy or receipt, and neither class of companies doing business in this State, shall issue any policy other than that appropriate to its class: Provided, that any mutual insurance company now doing business in this State, having net assets not less than two hundred thousand dollars invested as provided in section six of this chapter, for the capital stock, may issue policies either upon the mutual or stock plan, and may continue to do such kind of business as above, as long as their assets shall continue invested as above; and provided further, that any mutual insurance company having assets so invested, shall have the right to expose

itself to loss on any one risk or hazard, either by one or more policies, to an amount not exceeding five per cent. thereof.

SEC. 18. It shall be the duty of the president or vice-president and secretary of each fire insurance company organized under this chapter, or incorporated under any law of this State, annually, on the first day of January, or within thirty days thereafter, and of each marine insurance company within sixty days thereafter, to prepare under oath, and deposit in the office of the Superintendent of Insurance, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form, namely :

First—The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second—The property or assets held by the company, specifying :

1. The value, or as nearly as may be, of the real estate owned by such company, where situate, and value of buildings.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, constituting the first lien on real estate, on which there shall be less than one year's interest due or owing.

5. The amount of loans on which interest shall not have been paid within one year.

6. The amount due the company on which judgments have been obtained, and the cash value thereof.

7. The amount of stocks of this State, the United States, of any incorporated city of this State, and of any other stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock.

8. The amount of stocks held as collateral security for loans, with the amount loaned on each kind of stock, its par value and market value.

9. The amount of assessments on stock or premium notes, unpaid.

10. The amount of interest actually due and unpaid, and the amount of interest accrued but not due.

11. The amount of premium notes on which policies are issued.

12. The number of policies in force.

13. The amount insured under all policies in force.

14. The amount of premiums received thereon.
15. The amount of all other assets, specifying what.

Third—The liabilities of such company, specifying :

1. The amount of losses due and unpaid.
2. The amount of claims for losses resisted by the company.
3. The amount of losses incurred during the year, including those claimed and not due, and of those reported to the company upon which no action has been taken.

4. The amount of dividends declared and due, and remaining unpaid.

5. The amount of dividends, either cash or scrip, declared, but not due.

6. The amount of money borrowed, and security given for the payment thereof.

7. The amount required for re-insurance, as provided in this act.

8. The amount of all other existing claims against the company.

Fourth—The income of the company during the preceding year, specifying :

1. The amount of cash premiums received.
2. The amount of notes received for premiums.
3. The amount of interest money received.
4. The amount of income received from other sources.

Fifth—The expenditures during the preceding year, specifying :

1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid in taxes.

5. The amount of all other payments and expenditures.

SEC. 19. The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes originally forming the capital, and also what proportion of said notes is still held by such company and considered capital. Every insurance company, organized under any law of this State, failing to make and deposit such statement, or to reply to any inquiry of the said superintendent, shall be subject to a penalty of five hundred dollars, and an additional five hundred dol-

lars for every month that such company shall continue thereafter to transact any business of insurance.

SEC. 20. It shall not be lawful for any insurance company, association or partnership, incorporated, organized or associated under the laws of any other State of the United States, or any foreign government, for any of the purposes mentioned in this chapter, directly or indirectly, to transact any business of insurance in this State without first procuring from the superintendent a certificate of authority so to do; nor shall it be lawful for any person or corporation, directly or indirectly, to act as agents in this State for any such company or association, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, without first procuring from the superintendent a license so to do, stating also that said company has complied with all the requisitions of this act applicable to such company, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent or agents may be established; nor shall it be lawful for any insurance company, association or partnership organized under the laws of any other State, directly or indirectly to take risks or transact business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this chapter, nor unless the entire capital stock of said company be fully paid up and invested as required by the laws of the State where organized; and any company desiring to transact any business as aforesaid, by any agent or agents, in this State, shall file with the superintendent a written instrument, duly signed and sealed, authorizing any agent or agents, of such company, in this State, to acknowledge service of process, for and in behalf of such company in this State, consenting that service of process, mesne or final, upon any such agent or agents, shall be taken and held to be as valid as if served upon the company according to the laws to this or any other State or country, and waiving all claim or right of error by reason of such acknowledgment of service, also waiving all claim or right to transfer or remove any cause then or thereafter pending in any of the courts of this State, wherein such company may be a party, to any of the courts of the United States; and consenting that suit may be brought thereon in the county where the property insured was situated, or where the same was insured and that service of process made therein by the sheriff of such county by sending a copy thereof by mail addressed to the company at the place

of its principal office when it ceased to do business as aforesaid, at least thirty days prior to taking judgment in said suit, shall be as valid as if personally made upon said company according to the laws of this or any other State or government; provided, that the sheriff's return shall show the time and manner of such service: they shall also file with the superintendent a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president, or other chief officer, and the secretary of the company, for which he or they may act, stating the name of the company and place where located; the amount of its capital, with a detailed statement of the facts and items required from the companies organized under the laws of this State, as per sections eighteen and nineteen of this chapter; also a copy of the last annual report, if any was made, under any law of the State by which such company was incorporated.

SEC. 21. Any company incorporated by or organized under the laws of any foreign government, shall deposit with the Superintendent of Insurance, for the benefit and security of the policy holders residing in this State, a sum not less than one hundred thousand dollars in stocks of the United States or of the State of Ohio, said stocks not to be received by said superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities. So long as the company so depositing shall continue solvent and comply with the laws of this State, it shall be permitted by said superintendent to collect the interest or dividends on said deposit. It shall not be lawful for any such company to insure within the limits of this State on a single risk or hazard, either by one or more policies, to an amount greater than five per cent. of the capital of such company as hereinafter defined. For the purposes of this act, the capital of any foreign insurance company, doing fire insurance business in this State, shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State, and of the other States of the United States, for the benefit of policy holders in this State, or in the United States, and its assets and investments certified according to the provisions of this act in the United States; provided, that such assets and investments be vested in and held within the United States, by trustees, citizens of the United States, appointed by the board of directors of the company, and approved by the insurance commissioner of the State where invested, for the benefit of the policy holders and creditors in the United States. The trustees so chosen, are hereby empowered to take,

hold and convey real and personal property for the purposes of the trust, subject to the same restrictions as insurance companies of this State.

SEC. 22. Every insurance company, other than life, organized by the act of Congress, or under the laws of any other State or government, shall, annually, at the same time and in the same form and manner as required of similar companies organized under the laws of this State, file a statement of its condition and affairs in the office of the Superintendent of Insurance. Any company organized under or incorporated by any foreign government, shall also furnish a supplementary statement for the year ending on the preceding thirty-first day of December, verified by the oath of the manager of such company residing in the United States; such supplementary statement shall comprise a report of their business and affairs in the United States, as required from companies organized in this State, together with any other information that may be required by the Superintendent of Insurance. If the said annual statement shall be satisfactory evidence to the Superintendent of Insurance of the solvency and ability of such company to meet all its engagements at maturity, and that the said deposit is maintained as hereinbefore provided, he shall issue renewal certificates of authority to the agents of said company, certified copies of which shall be filed in the county recorder's office of the county where the agency is located, during the month of January in each year, or within sixty days thereafter, which certificates shall be the authority of such agents to issue new policies in this State for the ensuing year.

SEC. 23. Any company heretofore organized under any law of this State for any of the purposes mentioned in this chapter, which has taken notes or obligations of its stockholders for any portion or portions of the amount subscribed by them to its capital stock, shall retain from any dividend declared to such stockholders, their heirs or assigns, fifty per cent. of the amount of such dividend, and apply the same as a credit upon such stock notes until such notes shall be fully paid; and the whole amount now or hereafter payable to any such company on stock, notes or obligations, shall, within five years from the first day of July, A. D. 1869, be collected and invested by said company in the manner required by the sixth section of this chapter; and any joint stock insurance companies of the kind contemplated in this chapter, heretofore organized under the laws of this State, with a less capital than two hundred thousand dollars, shall, within five years from the first day of July, A. D. 1869, increase its capital stock to at

least two hundred thousand dollars, paid up and invested in the manner required by the sixth section of this chapter; and any company failing to comply with any of the provisions of this section shall forfeit its charter.

SEC. 24. All buildings heretofore or hereafter insured by any mutual insurance company, shall be pledged to such company, together with the right and title of the insured, in the lands upon which they are situate, to the amount of the premium note to be insured; and the company shall have a lien thereon to the amount of such note, but the lien of the company shall not take effect until the company shall file with the recorder of the county in which the property insured is situate, a certificate stating the date, number and amount of such premium note, and such a description of the property insured as will enable any one readily to identify the same. The recorder shall record and index said certificate in his book of liens, for which he shall receive the sum of fifty cents; and all liens heretofore acquired by any insurance company shall continue in force under this act.

CHAPTER II.

LIFE INSURANCE.

SECTION 1. Any number of persons, not less than thirteen, may associate and form a corporation or company, to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith, on the mutual or stock plan, and to grant, purchase or dispose of annuities.

SEC. 2. Every life insurance company organized under the laws of this State, shall have authority to reinsure any risk herein authorized to be undertaken.

SEC. 3. No life insurance company organized under the laws of this State, shall undertake any business or risk, except as herein provided, and no company, partnership or association, organized or incorporated by act of Congress, or under the laws of this or any other State of the United States, or by any foreign government, transacting the business of life insurance in this State, shall be permitted or allowed to take any other kind of risks except those connected with or appertaining to making insurance on life, and granting, purchasing and disposing of annuities; nor shall the business of life insurance in this State be in anywise conducted or transacted by any company, partnership or association, which in this or any other State or country, makes insurance on marine, fire, inland or any other risk: Provided, that insurance companies now doing a life and accident, or accident insur-

ance business within this State, shall not be prohibited by the provisions of this act from the continuance of the same.

SEC. 4. The persons referred to in the first section of this chapter, shall be designated as incorporators, and they shall file in the office of the secretary of State, a declaration, signed by each of the incorporators, setting forth their intentions to form a company for the purposes named in this chapter, which declaration shall comprise a copy of the charter they propose to adopt, and the said charter shall set forth the name of the company, the place where it is to be located, the kind of business to be undertaken, the manner in which the corporate powers of the company are to be exercised, the manner of electing the trustees or directors, and the number thereof, and officers, a majority of whom shall be citizens of this State, and the time of such election, the manner of filling vacancies, the amount of capital to be employed and such other particulars as may be necessary to explain and make manifest the objects and purposes of the company, and the manner in which it is to be conducted.

SEC. 5. Whenever the incorporators shall file such declaration with the secretary of State, it shall become his duty to submit the same to the attorney general for examination, and if found by him to be in accordance with the provisions of this act, and not inconsistent with the constitution and laws of the United States, and of this State, he shall certify to the same, and deliver it back to the said secretary, who shall cause the said declaration, with the certificate of the attorney general, to be recorded in a book to be kept for that purpose, and upon application of the incorporators to said secretary, it shall become his duty to furnish a certified copy of such declaration and certificate to the said incorporators.

SEC. 6. Whenever the incorporators shall have received from the secretary, the certified copy provided for in section five (5) of this chapter, and desire to proceed to organize such company, they shall publish their intention in a paper published and having general circulation in the county in which said company is to be organized; and when such intention shall have been published in said newspaper for six weeks, they may open books to receive subscriptions to the capital stock, and keep such books open until the amount required by this act is subscribed, and may then proceed to distribute the stock among the subscribers, if more than the necessary amount is subscribed, and proceed to collect in the said capital, and complete the organization of the company. When any life insurance company, organized under this chapter, or any law of this State, shall, in the opinion of the

board of directors thereof, require a larger amount of capital than that fixed by its charter or certificate of incorporation, they shall, if authorized by the holders of two-thirds of the stock, file with the secretary of State a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have the increased amount of capital fixed by such certificate, and the same shall be invested as required by section seven (7) of this chapter.

SEC. 7. No life insurance company shall be organized under this chapter with a less capital than two hundred thousand dollars. The whole capital of such company shall, before proceeding to business, be paid in and invested in treasury notes, or in stocks of the United States, or in stocks of the State of Ohio, or in mortgages on unincumbered real estate within the State of Ohio, worth double the amount loaned thereon, exclusive of buildings thereon: Provided, however, that nothing herein contained shall require any life insurance company already organized under any law of this State to increase its capital stock.

SEC. 8. Any life insurance company organized under this chapter, or any other law of this State, may invest its capital in stocks, bonds and mortgages, or securities mentioned in the preceding section, and change and invest the same or any part thereof in like manner, at pleasure; but no company shall commence business until it has deposited with the Superintendent of Insurance at least one hundred thousand dollars in the stocks, bonds and mortgages aforesaid, or one or more of them, duly made or assigned to said superintendent, in trust for the purposes mentioned in this act. And when any mortgage of real estate has been or shall hereafter be assigned to said superintendent, said assignment shall be immediately entered in the records of the county in which such real estate is situate; the fee for recording of which shall be paid by the company.

SEC. 9. The Superintendent of Insurance shall hold such securities as security for policy holders in said companies, but as long as any company so depositing shall continue solvent he shall permit such company to collect the interest or dividends on its securities so deposited, and from time to time to withdraw such securities, or any part thereof, on depositing with said superintendent other securities of the kinds heretofore named and of equal value with those withdrawn.

SEC. 10. Whenever the corporators shall have fully organized such company, and shall have deposited with the superintendent the requisite amount of capital, said superintendent shall furnish the

company with a certificate of such deposit, which, with a certified copy of the papers required by this chapter, when filed in the county recorder's office of the county wherein such company is located, shall be the authority to commence business and issue policies, and the same may be used in evidence for and against the company in all suits.

SEC. 11. It shall be lawful for any life insurance company organized under the laws of this State, to invest its accumulations of bonds and mortgages on unincumbered real estate, worth fifty per cent. more than the amount loaned thereon, exclusive of buildings, unless such buildings shall be insured in some insurance company authorized to do business in this State, and the policy or policies of insurance be assigned as collateral security for the loan so made, when, in addition to the amount authorized to be loaned on real estate exclusive of buildings, there may be added thereto not exceeding fifty per cent. on the amount of the policy or policies so assigned; or in stock or treasury notes of the United States; or in stock or bonds of the State of Ohio; or in bonds of any county or incorporated city in this State, authorized by law; or in first mortgage railroad bonds; or to invest not to exceed ten per cent. of its accumulations in the stock of any dividend paying railroad company; and they may lend the same, or any part thereof, upon the pledge of such stocks, bonds or treasury notes: Provided, that the current market value of said stocks, bonds or treasury notes of the United States, or of the State of Ohio, shall be at least ten (10) per cent. more than the amount loaned thereon, or that the current market value of the said bonds or stocks of any county, city or railroad, shall be at least twenty-five per cent. more than the amount loaned thereon; or they may loan upon the stocks of the national banks incorporated within the State of Ohio, but the current market value of such stocks shall be at last fifty per cent. more than the amount loaned thereon. Loans may also be made upon any policy in force in said company, but not to exceed the value of the same according to the basis hereinafter provided.

SEC. 12. No life insurance company organized under the laws of this State, shall be permitted to purchase, hold or convey real estate, except for the purposes and in the manner herein set forth, to-wit:

1. Such as shall be requisite for its immediate accommodation in the transaction of its business: or,
2. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted, or for moneys due; or,
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

4. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts ; and it shall not be lawful for any company incorporated as aforesaid to purchase, hold or convey real estate in any other case or for any other purpose.

SEC. 13. All such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the convenient transactions of its business, shall be sold and disposed of within two years after such company shall have acquired title to the same ; and it shall not be lawful for such company to hold such real estate for a longer period than that above mentioned, unless the said company shall procure a certificate from the Superintendent of Insurance that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the said superintendent shall direct in said certificate.

SEC. 14. The corporators, or the trustees or directors, as the case may be, of any life insurance company organized under the laws of this State, shall have power to adopt a seal, and to make such by-laws, not inconsistent with this act or the constitution and laws of this State, as may be deemed necessary for the management of its affairs.

SEC. 15. Suits at law may be maintained by any life insurance company formed under the laws of this State, against any of its members, officers, policyholders or stockholders, for any cause relating to the business of such company ; also, suit at law may be prosecuted and maintained by any member, stockholder or policyholder, or the heirs or legal representative of either, against such company for losses which may have accrued, if payment is withheld more than two months, on all risks, after such losses shall have been due.

SEC. 16. It shall not be lawful for the directors, trustees, managers or officers of any life insurance company, organized under the laws of this State, directly or indirectly, to make or pay any dividend, or pay any interest, bonus or other allowances in lieu of dividend, to its stockholders, except from the surplus funds, after reserving therefrom an amount sufficient to reinsure all its outstanding risks and policies, estimating the value thereof by the table known as the American experience table, with interest at four and one-half per cent. per annum.

SEC. 17. It shall be the duty of the president or vice-president, and secretary or actuary, or a majority of the trustees or directors of each life insurance company organized under the laws of this State, annually, on the first day of January, or within sixty days thereafter,

to prepare, under oath, and deposit in the office of the Superintendent of Insurance, a statement showing the condition of the company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form, to-wit :

1. The number of policies issued during the year.
2. The amount of insurance effected thereby.
3. Amount of premiums received during the year.
4. Amount of interest and all other receipts, specifying the items.
5. Amount of losses paid during the year.
6. Amount of losses unpaid.
7. Amount of expenses.
8. Whole number of policies in force.
9. Amount insured thereby.
10. Amount required to re-insure all policies in force, estimating the same by the table, as the actuaries' or combined experience table, with interest at four per cent. per annum ; also, amounts of all other liabilities.
11. Amount of capital stock, specifying amount paid and unpaid.
12. Amount of assets, and manner in which they are invested, specifying what amount in real estate, on bonds and mortgages, stocks, loans on stocks, premium notes, credits or other securities.
13. Amount of dividends unpaid.
14. An exhibit of the policy obligations of the company, as follows : With the first annual statement required under the provisions of this chapter, there shall be prepared and deposited a schedule, showing the number, date, age, when insured, amount insured, term of policy, and term of premium of all policies then in force, and with every succeeding annual statement a schedule of the foregoing items as to all policies issued during the year, and a similar schedule as to policies which shall have ceased to be in force during the year.

SEC. 18. It shall not be lawful for any life insurance company, organized by act of Congress, or by or under the laws of any other State of the United States, to transact any business of insurance in this State, without first procuring from the Superintendent of Insurance a certificate of authority so to do ; nor shall it be lawful for any person or corporation, directly or indirectly, to act as agent in this State for any such company, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, without first procuring from the Superintendent of Insurance a license to do so, in which said Superintendent shall state that said company has complied with all the requisitions of this act appli-

cable to such company, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent shall be established; nor shall it be lawful for any such company to take risks, or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies organized in this State under the provisions of this act; nor unless the entire capital stock of said company is fully paid up, and invested as required by the laws of the State where organized; and any such company desiring to transact any such business in this State by an agent or agents, shall file with the Superintendent of Insurance a written instrument, duly signed and sealed, authorizing any agent or agents of such company in this State, to acknowledge service of process for and in behalf of such company in this State, consenting that the service of process, mesne or final, upon any such agent or agents, shall be taken and held to be valid, as if served upon the company according to the laws of this or any other State or government, and waiving all claims or rights of error by reason of such acknowledgement of service; also waiving all claim or right to transfer or remove any cause then or thereafter pending in any of the courts of this State, wherein such company may be a party, to any of the courts of the United States; said company shall also file a certified copy of its charter or deed of settlement, together with a statement under the oath of the president, vice-president, or other chief officer or manager, and secretary of such company, stating the name of the company, the place where it is located, and amount of its capital, with a detailed statement of all the facts required in the annual statements required of companies organized under this chapter, except as to statement required by item fourteen, section seventeen of this chapter, which statements shall be required of said companies only when required by the Superintendent of Insurance, for purposes of actual valuation as provided by the insurance laws of this State; also, a copy of their last annual report, if any were made; nor shall it be lawful for any such company to transact any business of insurance in this State, unless at least one hundred thousand dollars of its capital is invested in the interest-paying bonds or stocks of the United States, or of this State, or of some other State of the United States, of the market value of one hundred thousand dollars, in the city of New York, or in bonds and mortgages on unincumbered real estate in this State, or in the State under the laws of which such company is or may be organized, of at least double the value of the amount loaned thereon; and such bonds

and mortgages deposited with the Superintendent of Insurance of this State, or the chief financial or other officer of the State in which such company is or may be organized, designated by the laws of such State to receive the same; and if said bonds and mortgages be deposited with the Superintendent of Insurance or other officer of another State as aforesaid, the Superintendent of Insurance of this State shall be furnished with the certificate of such other State officer, under his hand and official seal, that he, as such officer, holds in trust and on deposit, for the benefit of all the policy holders of such company, the securities above mentioned, giving the items of such securities, and stating that he is satisfied such securities are worth at least one hundred thousand dollars: Provided that nothing herein contained shall be construed to prevent the company from collecting the interest on such securities, so long as it continues solvent, and complies with all the provisions of this act applicable to it, nor from exchanging for other securities of equal value, and of the kind hereinbefore named, with the officers having them in trust as aforesaid.

SEC. 19. All licenses granted by the Superintendent of Insurance in pursuance of this chapter, shall continue in force, unless suspended or revoked, until the first day of April of the year next after the date of their issue; and in case any life insurance company organized under the laws of any other State or government, shall cease to do business in this State according to law, the said company shall appoint, in the manner herein provided for, in every county wherein an agency existed at the date of such discontinuance to do business, one or more agents for the purpose of receiving service of process in all actions upon policies of insurance issued to the citizens of this State, while such company was lawfully transacting the business of insurance in this State, and service of process in the actions aforesaid upon such agents shall be held to be as valid as actual service upon the company; and in every case where no such agent shall be appointed, the agent last designated and acting for said company, shall be deemed and taken to be duly authorized by said company as to receive service of process as aforesaid: Provided, however, that the officer serving such process shall also send a copy of the process served on such agent, by mail, to the address of such company, at the place of its principal or home office, at the time it ceased to do business in this State, and the return of such officer upon such process shall distinctly show that such copy was mailed as aforesaid, at least thirty days before any judgment shall be rendered in such action.

MISCELLANEOUS DEPARTMENT.

LIEN PLAN AND INVESTMENT POLICIES OF THE LIFE ASSOCIATION.

Early in the present year the Life Association of America issued their Annual Report, representing that on the 31st day of December, 1871, the total assets of the company amounted to \$3,613,153.50, the total liabilities to \$3,246,516.05, leaving a balance of \$366,637.45 as surplus.

About the same time it was officially announced to the public that a resolution had been adopted by the officers of the company, ordering the reservation of \$200,000 of the reported surplus assets, as a safety fund for the better security of the policy-holders; the balance only, \$166,637.45, to be distributed as dividends. Subsequent investigations into the status of the Association, by the committee of actuaries, appointed at the instance and on the demand of the New York Board of Trustees, revealed the fact that the supposed surplus was mostly unreal, and nearly vanishes when corrected, on account of "errors and misvaluations," and the public are left to a choice of conclusions, either that the safety fund resolution, was adopted with full knowledge of the questionable character of a certain portion of the reported assets, under cover of creating a prudential reserve, or that the managers of that institution were, as the New York committee assume, misled by their actuary, and were not expert enough in life insurance finance to detect the deception. On this point opinions may be divided. Practically, however, it is of no consequence whether one or the other of these conclusions be adopted. The fact remains, and most seriously affects the character of the company's management, that the sum of \$200,000 was solemnly dedicated as a safety fund reserve out of a reported surplus that the managers had the means of knowing were mainly fictitious. It was only necessary for them to call out from their own archives, the elaborate opinion of the Hon. Elizur Wright, procured by them from him before the adoption of "lien plans" of insurance, to show that if they were deluded and

misled by their actuaries, they permitted themselves to be so deluded and misled without the salutary precaution of deliberate inquiry. It is true that Mr. Homans, who was also consulted by the Association before the adoption of the plan, had given an endorsement of it, in an off-hand and rather unprofessional certification of it, as introducing "a reform greatly needed in the practice of life insurance," which has since been extensively advertised by the company in their agents' manuals, but the suppression of Mr. Wright's opinion referred to justifies the gravest suspicion that private emolument was strongly influential in inducing the adoption of the plan by the officers of the Association. This suspicion is strengthened by the statement put forth by the New York committee, that 25 per cent. of the savings on agent's commissions realized by the action of the new plan, and an annuity of \$1,500 were settled upon the reputed inventor of the plan, as compensation for the use of it by the Association.

These statements will suffice to call attention to the very significant fact that Mr. Wright, although he signs the report of the actuaries, does so with a reservation, which it is plain to be seen, is a substantial dissent from the view taken by his associates of the lien policy valuations, the form of reserved opinion being preferred by him to a minority report.

It will be observed by the reader of the New York committee's report, and that of the actuaries, that there are two distinctive devices in the Life Association system of insurance, the Lien policy and the Investment Endowment policy, and that the proper disposal of these in the company's valuation, was the main question before the actuarial council. As the existence of the policies has always been a source of trouble to the company from the time of their issue, it is proper that some explanation of them, both analytical and historical, should be given to the public.

The Lien Plan.—The "Lien," or, as it is generally distinguished in the company's manuals, the "Low Cash Policy," is a policy issued on a reduced premium, carrying a lien the equivalent of the reduction, which, while it remains uncanceled, operates as a reduction, also, of the face of the policy. For example, at the age of 35 years, the reduced premium on an insurance of \$1,000 is \$22.72, the lien \$20.40. At the age of 50 years the premium is \$40.20, the lien \$41.39. At the age of 60 years, the premium is \$63.33, the lien \$61.86. At the different ages the liens are determinable by the reductions made in the premiums chargeable at those ages, and therefore are not uniform.

The claim set up in favor of the lien system is, that it cheapens insurance, as the face of the policy is not reduced in proportion to the amount taken off from the premium.

The manner in which the liens are constituted, and the position which they should hold in the balance sheet of the company, will be made plain by the following explanations :

A *single* premium for an insurance of \$1,000 on each of any number of lives, assume 1,000 lives at a given age, and at an assumed rate of interest, which in the present case is four and one-half per cent., is that sum which, if paid by each of the 1,000 persons, and accumulated by the company at four and one-half per cent. interest, annually, will enable the company to pay the sum of \$1,000 to each of the estates of the assured as they may severally die, and until the last one of them is dead. An *annual* premium for the same purpose and on the same conditions, is that sum which being paid *annually*, and accumulated as before stated, will during the lives of the persons be the equivalent of the single premium and its accumulations. Therefore, it is plain to be seen that the *single* premium is the present value of all the future premiums probable that are payable to the company during the lifetime of the insured. Hence, one-tenth part of the single premium is the present value of ten per cent. of the future annual premiums probable, and if this present value be either paid the company in cash, or be made a lien upon the policy, the holder of the policy paying to the company interest on it at four and one-half per cent. annually, the company may make a ten per cent. reduction of the annual premium without damaging its solvency. The Life Association lien is of this nature, differing from it only in this one respect, that it is the present value of ten per cent. of the annual premiums, capitalized at eight per cent. per annum instead of four and one-half, and this eight per cent. annual interest is incorporated into the premium. If, therefore, the lien is considered an offset, it must also be regarded as the representative, by anticipation, of parts of premiums that are to become due in subsequent years, and must therefore be in the hands of the company, together with its accumulations at eight per cent. compound interest, when those premiums become due, in order that the company may realize the premiums in full from year to year. The lien, therefore, is a liability, and must appear, not on the credit side of the balance sheet alone, but on the debit side as well. Hence, the practice of the Association in reporting it only as an asset, was a falsification of its true status.

This conclusion will be understood by those who are familiar with

the mathematical basis of insurance, and may be understood by all under another aspect of the case, by observing the actual or practical effect of the lien upon the policy. At the age of thirty-five years a policy for \$1,000 on the life plan of the Association carries a lien of \$20.04, for which the holder pays an annual premium of \$22.77. At his death his heirs receive \$1,000, less \$20.04, the amount of the lien. Practically, therefore, he is insured in the sum of \$979.96, instead of \$1,000. The effect of this upon the valuation of the policy is obvious. The lien practically lessens the company's reserve liability in the same proportion that it lessens the face of the policy; or if the company is charged with the full reserve on the policy of \$1,000 as a liability, it will be entitled to a credit, not of the entire lien, \$20.04, but of a sum that shall bear the same ratio to the entire liability on \$1,000, which the lien itself bears to the face of the policy, and this would be the same as charging the company with its actual reserve on the reduced policy.

The falseness of the Association's returns, therefore, consisted in their reporting the liens as a credit and omitting to carry them to the debit side of the sheet as a liability. This had the effect to swell the surplus of the balance sheet to an amount exceeding \$366,000, while the true surplus was, according to the usual mode of valuation adopted by Mr. Wright, only about \$53,000. The joint report of the actuaries, it is true, represents the surplus a little over \$104,000. But this surplus was made up by the unusual device of anticipating future interest, or excess of current interest over four per cent., and deducting it, although unrealized and unaccrued, from the actual legal liability of the company at the close of the preceding year, a proceeding which it is easier to account for than to justify.

Mr. Wright signed the report with a reservation in an appended explanation, overruled, evidently, by his associates, one of whom, Mr. Homans, had stood sponsor for the lien at its baptism, and was publicly committed to its support, and the other, Mr. Bryant, may have been in that peculiar state of mind which one is liable to experience when he sees a \$15,000 position vacated and placed within the possibilities of attainment.

The history of the action of the council of actuaries shows that in the course of its proceedings some event had taken place which induced a change of mind, and caused the withdrawal of their first report, made April 15th, 1872, and the substitution in its place of the report of May 28th, which is a serious modification of the original. According to the public journals, the April report ruled out over

\$368,000 from the assets on account of liens and misvaluations, an amount which exceeded the supposed surplus by the sum of \$2,000. This, about which there appears to be no doubt, occurred during the incumbency of Mr. Barnes. After the resignation of Mr. Barnes, an event which put out of the way some personal complications, promises having been made by the officers of the Association to correct faults of administration, to reconstruct their charter and organization, and to appoint a competent head, the actuaries went to work to form a revised report. The device hit upon was to deduct from the actual legal liability of the company on the 31st day of December, 1871, the surplus unaccrued interest of the year 1872. It is impossible to invent an honest apology for this unusual and deceptive proceeding. Had they adopted Mr. Wright's plain unvarnished estimate of the financial status of the Association, which was strictly in accord with actuarial usage and the laws of valuation adopted by State legislation, the council would have better maintained their dignity, and secured higher respect for their decisions. But when from motives of partiality or possible self-interest, they violated not only the laws of custom, but the laws of State valuation, not even the plea that "it will be entirely proper, and in conformity with the practice of many of the best companies, to reserve at the current rate of interest for the unexpired part of the policy year," will suffice to relieve them from the charge of committing an act that is inconsistent with strict professional integrity. That the amended report of May, which superceded the original report of April, was the creature of the new circumstances and influences that had arisen in the interim between April 15th and May 28th, is supported by such clear evidence as to entitle it to public acceptance.

Investment Endowment Policy.—The other peculiar feature of the Association noted above, the Investment Endowment policy, has a peculiar history, which entitles it to a place in the record of American insurance. The Hon. Elizur Wright characterizes it a nondescript policy, which cannot be accounted for in any other way than by supposing that the Association was in want of money. Suspicions, however, have arisen in other quarters that the private advantage of the projectors of the new device was at the bottom of the transaction. The policy, or more properly the agreement, as the committee style it, provided that in consideration of the payment by the holder to the Association of a certain number of dollars specified therein, the Association assumed to insure the life of the holder in the same number

of dollars, under conditions and agreements, of which the following remarkable provision is chiefly worthy of note :

“And the said Association further covenants and agrees that the holder of this policy shall participate in all the savings and profits of the Association, and that in each division of such earnings and profits, the amount paid as dividend to the holder of this policy shall bear the same proportion to the reserve fund hereinbefore referred to as the amounts paid as dividends to the holders of ordinary life policies of the same number of years' duration shall bear to the annual premium on said policies. Such ordinary life policies being those which mature at the death of the insured, or upon his attaining the age of 80 years, and upon which the annual premium is stipulated to be paid during the continuance thereof.”

The following estimates of profits, made out and furnished in writing by the then actuary of the company, were exhibited to capitalists to whom these policies were offered, showing the enormous returns they might expect to realize from the investment :

*Investment Policy for \$1,000 ; Payable Twenty Years from date.
Single Premium, \$1,000 :*

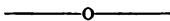
Years.	Reserve.	Dividend.	Amount of Dividend.	Percentage on Investment.	Value of Dividend Compounded.
1	\$414 60				
2	434 30	.33	\$142 98	\$14 29	\$794 96
3	452 80	.35	158 48	15 84	800 33
4	473 20	.37	175 01	17 50	803 30
5	494 50	.39	192 60	19 26	803 15
6	516 70	.41	211 84	21 18	802 87
7	540 00	.43	232 20	23 22	800 10
8	560 30	.45	253 80	25 38	794 40
9	589 70	.47	277 30	28 73	790 31
10	616 20	.49	301 84	30 18	781 77
11	643 90	.51	328 44	32 84	771 84
12	672 90	.53	356 69	35 66	763 32
13	703 20	.55	386 65	38 66	750 10
14	734 80	.57	418 38	41 83	740 53
15	767 40	.59	453 06	45 30	729 43
16	802 50	.61	489 22	48 92	714 26
17	838 60	.63	527 94	52 79	702 26
18	876 30	.65	569 40	56 94	688 98
19	915 70	.67	613 05	61 30	674 36
20	956 90	.69	660 33	66 03	660 80
			<hr/> \$6,749 21		<hr/> \$14,366 69

These extraordinary proceedings, sanctioned by the Board, many of the members of which still remain in the administration of the company, created general astonishment and alarm in the public mind, and raised a storm that burst with such tremendous effect upon the Association that the managers were compelled to retire the objectionable bonds at once. Fortunately, they were able to do so, and they eased the matter off by substituting a new Investment Endowment bond, which, although less objectionable in its provisions, did not avail to efface the blot upon their reputation as insurance financiers. This second Investment policy is the one to which the report refers as having been wrongly valued by the company's actuaries. This policy, however, has recently been retired, and thus, in connection with the abandonment of the lien plan, the last of the company's peculiar expedients, which had they proved successful in the inception, might have been the beginning of a stupendous career of speculative financing, have passed away.

It was necessary, on account of the notoriety which attended the investigation, that the report of the New York committee of actuaries should be laid before the public. In doing this, the officers of the Association appended an address to the patrons of the company, which, viewed as an attempt at self-vindication, must be regarded as utterly failing of its intention. The tone of mortification which pervades it, and of dissatisfaction with the actuarial results, even as modified in the revised report, indicates a surprising lack of courtesy towards the distinguished members of the commission, and of tact and ability to meet emergencies with self-possession and dignity. No better opportunity could possibly have been presented to the officers of the company to display the manly attributes that distinguish true greatness, and to make full proof of their sufficiency for the new conditions that had arisen, than was offered them by the plain and candid, yet respectful and tolerant treatment they had received at the hands of the New York committee, and the actuaries. But instead of availing themselves of the opportunity, they in the first place except captiously to the public manner in which the New York committee express their opinions of the reforms needed in the existing administration. In the second place, they appeal, in support of their valuation of the lien policy to the opinion of the Hon. Julius L. Clarke, Commissioner of Massachusetts, who, though distinguished officially as the Superintendent of Insurance, cannot be considered the peer of Wright, Homans and Bryant, in actuaryship. They further bring to their support the written opinion of the Deputy Commissioner of Mis-

souri, an excellent man in the details of his office, yet of insufficient professional authority in a matter of so grave importance as that which has been submitted to the adjudication of three men whose pre-eminence in American actuaryship is undisputed.

A more graceful acceptance of their adjudications would have been more honorable towards the members of the commission, and more creditable to the good sense of the managers.



CASES REPORTED.

A full report of the decisions in nine cases is given this month.

Black vs. The Winnesheik Ins. Co., was decided in the Supreme Court of Wisconsin. After the loss the company agreed to pay, on a fixed day, the amount that had been determined upon by the adjustment, unless it should notify the insured before that time of its intention to contest its liability under the policy. The court held that the period between the time of entering into the agreement and that fixed for giving the notice by the company, should be excluded, in computing the time within which the suit was to be brought by the terms of the policy.

The case of *The Cincinnati Mutual Health Assurance Company vs. Rosenthal* arose upon a premium note given the company for a health policy. The defense was that the company had not complied with the conditions imposed by the State law upon insurance companies from other States. The court held that it was competent for the State to prescribe conditions, upon which corporations from another State may transact business within its borders, and that such corporations are not citizens of the State in which they are created in such sense as to exempt them from the operation of such conditions, and that as this contract was unlawful under the statute, the note was void in the hands of the company. This case was decided in the Supreme Court of Illinois.

The Home Mutual Fire Insurance Company vs. Hauslein, was also decided in the Supreme Court of Illinois. The insured assigned the policy, with the consent of the company, and afterwards violated the conditions of the policy by a change of the title to the property insured. The court held that the policy was void, and that the assignee of a policy takes it subject to the conditions expressed upon its face, and that his equities confer no right if the assignor has lost the right by a violation of the terms of the policy.

In *The Commercial Insurance Company vs. Ives*, the insured ap-

plied to the agent of another company, who was familiar with the property, for insurance. This agent made out the application without consulting the insured, and procured the insurance. The Supreme Court of Illinois held that he was to be considered the agent of the company and not of the insured, and that the company could not relieve itself of the responsibility for his statements, made in the application, by a provision in the policy that any other person than the insured, who may procure the insurance, shall be deemed the agent of the insured and not of the company. Judge Sheldon, in delivering the opinion, says, "a device of mere words cannot, in a case like this, be imposed upon the view of a court of justice, in place of an actuality of fact, and make this company and its agents the agents of appellees, and their doings the doings of appellees."

The Court of Appeals of New York held in *Pindar vs. The Resolute Fire Insurance Company*, that where the policy expressly declares that only goods not hazardous and hazardous are insured, and that the keeping of extra or specially hazardous goods on the premises shall avoid the policy, and such language has a settled meaning, parol evidence, tending to show a different understanding or agreement, preceding or cotemporaneous with the issuing of the policy, is inadmissible.

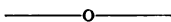
In *The Lamar Fire Insurance Company vs. McGlashen et al.*, a marine case, decided in the Supreme Court of Illinois, several questions arose in regard to the measure of the company's liability on a cargo of damaged corn, and the charges to be borne by the underwriter.

The case of *Hough vs. Aetna Life Insurance Company*, arose on a bond conditioned that a local agent should pay over to the company the moneys he might receive. The court held that the surety was not released by reason that no notice was given to him of the defalcation of his principal, and that notes given by the principal to a general agent of the company, for moneys retained, should have been surrendered before judgment on the bond. The most interesting question in the case was whether the settlement of the delinquencies of the local agent by the general agent was a payment and discharge of the bond. Unfortunately, the opinion of the court upon this point is very vague and obscure. This case was decided in the Supreme Court of Illinois.

Mallory vs. Travelers Insurance Company, was an action upon a policy for death caused by accident. The Court of Appeals of New York held that a policy procured by the deceased, for which he paid

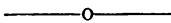
the premium, making the loss payable to the plaintiff, was in effect a policy procured by him upon his own life, and an assignment thereof; that where it appeared that the death was caused by an accident or the suicidal act of the deceased, the presumption is against the latter, but that it was for the jury to determine the question; and that if a wound, produced by an accident, did not cause his death, but did cause him to fall into the water, where he died from drowning, then his death was accidental. The judgment in favor of the respondent and against the company was affirmed.

In *The Home Mutual Fire Insurance Company vs. Garfield*, the insured, stated in his application, that his title to the property was fee simple. At the time, he had a fee simple title, subject to an incumbrance. The person holding the incumbrance informed the officers of the fact, before the policy was issued, and the incumbrance was mentioned in the policy. It was held that, taking the application and the policy together, there was no concealment of the true character of the title, and consequently no fraud. It was also held that where the company gave notice that it elected to build, after the lapse of a reasonable time, without prompt measures being taken for that purpose, the company is liable for the amount of the policy and interest, and that the notice effected no change in the character of the contract, and that it was error to instruct the jury that the company was bound to rebuild the building, cost what it may. The decision was rendered in the Supreme Court of Illinois.



INSURANCE LEGISLATION.

Maryland—Ohio.—Want of space prevents us from giving the remainder of the Ohio Law, and the abstract of the Maryland Law. They will appear in the next number.



MISCELLANEOUS.

BANKRUPTCY—INSURANCE COMPANY.

The following syllabus of the opinion of Judge Blatchford, delivered April 12th, 1872, is taken from the *Legal Gazette*, which contains the opinion in full. The petition for adjudication of bankruptcy against the company was dismissed with costs:

U. S. DIST. COURT SOUTHERN DIST. N. Y.

In the Matter of the Hercules Mut. Life Assurance Society of the U. S.

1. A mutual life assurance company is a business corporation within the purview of the thirty-seventh section of the bankrupt act of March 2d, 1867.
2. No one except a banker, broker, merchant or trader, could be proceeded against under the thirty-ninth section, for suspension of payment of commercial paper.

3. By the act of July 14th, 1870, this section was so amended that proceedings in bankruptcy may be instituted against:

I. A banker, broker, merchant, trader, manufacturer or miner, residing within the jurisdiction of the United States, and owing debts provable under the bankrupt act, exceeding the amount of three hundred dollars, immediately upon his fraudulently stopping payment of his debts.

II. All persons residing and owing debts as aforesaid, who make commercial paper and then stop or suspend payment of it for want of means, and do not resume payment within a period of fourteen days.

4. A person who is not a banker, broker, merchant, trader, manufacturer or miner, and who has not given any commercial paper, is not within this clause at all.

5. A direct fraudulent stoppage of the payment of debts is made an act of bankruptcy, only when committed by a person belonging to one of the six classes specified above.

6. A fraudulent stoppage of the payment of its debts by an insurance company is not an act of bankruptcy, because such a corporation is not within either of the said classes.

7. The refusal to pay commercial paper from a *bona fide* denial of liability, though persisted in for more than fourteen days, is not an act of bankruptcy, even if founded on reasons which would fall as a defense in a direct action on the paper.

8. Upon the resignation of the president of an insurance company, a new president took his place, who found the affairs of the corporation in confusion, its books not properly kept, and its accounts and those of the former president not separate, and the new president and his associates honestly doubted the liability of the corporation on certain commercial paper: *Held*, that the refusal to pay it, though persisted in for more than fourteen days from its maturity, was not an act of bankruptcy, notwithstanding in an action on the paper the corporation would be held liable.

MISREPRESENTATION OF RISK.

For the statement of the facts, which we have abridged, and for the opinion recently rendered in the following case, we are indebted to the *Pacific Law Reporter*:

UNITED STATES CIRCUIT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

People's Ins. Co. vs. Hartford F. Ins. Co.

The agent of the plaintiff applied to the agent of the defendant for re-insurance,

and submitted a diagram purporting to be a representation of the premises. This diagram represented a row of *two* frame buildings, occupied solely by the owner—one as a tailor shop and the other as a dwelling, with an open space on either side. The plaintiff's agent also stated that he was personally acquainted with the premises, and that the diagram was a correct representation of the risk. A policy of re-insurance was thereupon written by the defendant, at the rate required by the represented exposures. It appeared in evidence that at the time of the application for re-insurance, the owner of the premises had rented one portion for a bakery and another portion for a Chinese wash-house; and that, prior to that time, the plaintiff had given the owner permission to put a bakery in the building. It further appeared that the insured premises were a portion of a block of *seven* connected buildings, instead of two.

Sawyer C. J., rendered a verbal decision, and *Held*: That upon the question of fact, there could be no doubt there had not been, in the application for re-insurance, a disclosure of all the facts material to the risk, and that the defendant was entitled to know the true condition of the premises, and its true state, and all the facts necessary to give information as to the risk assumed. The defendant might have declined writing the risk at all, if the character of the occupancy of the premises had been made known. There was also in the policy issued by the defendant, a stipulation: "If the assured, in a written or verbal application, makes an erroneous representation, or omits to make known any fact material to the risk, this policy shall be void." There having been such erroneous representation by the assured, the defendant cannot be charged upon the policy.

Judgment for the defendant.

Gray & Haven for defendant.

McAllister & Bergin for plaintiff.

CONTESTING LIFE POLICY CLAIMS.

Opposed as we are to see our life institutions figuring in the courts, we cannot agree with our correspondent "P.", and advise the life companies of the country

to "accept the situation," and pay every scalawag who adroitly manipulates business so well as to fraudulently effect a policy, and so effectually cover up his tracks as to remove all cause of mistrust; but, when in a short time after this policy becomes a claim, and the company finds out the fraud that was practiced upon it, it is clearly incumbent upon the company to resist the payment, and if, on having recourse to the strong arm of the law, to maintain them in their just course, they are afterwards compelled to do injury to their other policy holders, they thus shift the responsibility from their own shoulders to those of the court and jury, by whose award they are forced to the perpetration of an injustice.

The principal cause of resistance to claims may be traced to fraud in making the application, to the effects of a course of drunkenness and dissipation, and to suicide. In each and every case it is the duty of the company to stand between the policy-holders and fraud, and though out of ten cases of this sort seven may be decided adversely, still the amount of the three cases favorably decided, will go far towards making up for the loss occasioned by the other seven, without taking into consideration the satisfaction of asserting and maintaining a principle.

We should be exceedingly sorry to see our companies adopting the pernicious practice of paying or compromising fraudulent claims. If a claim is a fair one, it should be paid in full; if not a fair claim, it should be resisted, but *not compromised*, as every dollar paid without a just cause, or through fear of a lawsuit, betrays on the part of the directors and managers, a want of moral courage and an unfitness to be placed in charge of such a trust as the custody of a life insurance business.

We hope soon to see a truer appreciation of life insurance contracts by judges and juries, and we cordially endorse the efforts of honest companies to protect to the utmost of their power the sacred interests confided to their charge, even if by so doing they are compelled to seek the protection of the courts.—*Philadelphia Underwriter*.

THE TONTINE PLAN.

BY ELIZUR WRIGHT.

[From the Insurance Times.]

In every life insurance company of large extent many policies are held by persons of considerable estate, who have no difficulty in paying the premiums, and who would by no means leave their families destitute if their claims should not be paid when due. Such policies doubtless contribute to the strength of the company, and it is no reason for refusing to insure a man that he is rich enough to do without it. A rich man may insure his house, why not his life? And especially if by so doing he strengthens an institution which provides an indispensable blessing for the man who has no estate but his life?

But if there were only rich men in the world, life insurance companies would be little better than superfluous, a waste of labor. Their true function is to provide a substitute for wealth, an estate which a poor man can bequeath. They exist particularly for *rub and go* people, whose year-ends scarcely more than meet. Such people always compose a very large, if not the largest, part of the insured. This is so true that, notoriously, many of them *rub and don't go*. Insurance is a great blessing to them while they can keep it up, and they might keep it up longer if it did not cost so much.

Now, with a distinct view of these two sorts of people who take life insurance policies, we are prepared to define, understand, and appreciate, the powerfully and expensively advertised "Tontine Plan." It is a contrivance to facilitate the going of the people who can go without rubbing, at the expense of the *rub-and-go* people. Its sole and only function is to make the richer part of the company richer *by making the poorer part poorer*. It does not introduce into the mechanism a single drop of lubricating oil, but it takes from the wheels that have too little whatever they have, and applies it to those that have no lack. It cunningly introduces into the body of the policy a bet on the persistence of certain annual payments, say for ten, fifteen, or twenty years, should the party live so long. This

little gambling arrangement, where the stake in the company's hands is the legal reserve and the surplus, is, of course a safe thing for it. It holds a considerable sum of money for which nobody can call it to account short of at least ten years.—This is a *very* comfortable thing for the company when it happens to be as much as it can do to show the legal reserve under a high pressure of present expenses. But it is rich, operates in a palace that Midas might envy, and will no doubt have the stakes ready to fork over at the end of a decade. How about the parties to the little game, by which is meant the Tontine feature as distinct from the insurance?

The losers are, first, those who have died in the meantime, and, second, those who have lapsed or forfeited their policies. The winners are those who have survived and kept their policies in force—supposing the company pays them what the company has lost, a supposition which calls for a certain amount of faith. The losers who have died, have lost by the Tontine bet only such surplus as had accrued up to the time of their death. This part of the loss, much the smallest, probably, for in ten years there are commonly many lapses to one death, and surplus is always small compared with reserve, falls equally on rich and poor. So that the game—one loves to call it a *little* game—is fair enough, as a game, in regard to this part of it. The losers who have lapsed, have lost both surplus and reserve, as they existed at the date of lapse. This is what, without exactly knowing its amount, they bet on their ability to meet ten, fifteen or twenty annual payments. Here the bulk of the loss is sure to fall on those least able to bear it, and the winnings go to those who least need them. As a game of long purses against short ones, it can hardly be said to be fair. At any rate, the average effect must be exactly the reverse of the avowed object of the institution.—It is as if a temperance society should endeavor to promote its cause by establishing a liquor saloon under its lecture room, or a church should support its minister by a lottery.

Insurance is necessarily, to a certain ex-

tent, a game of chance. Its peculiar benefit arises out of this fact. But the hazard should be kept at a *minimum*. The little appended game, called the "Tontine Plan," is wholly extraneous, superfluous and unnecessary. It could not possibly flourish if the fools were all dead, or nearly all. For that matter, we know that highly gullible, but not unworthy people so abound, that lotteries and many other sorts of gambling could flourish, if only legislatures would give sufficient corporate facilities. Why they allow their creatures who are authorized to deal in life insurance to entrap the unwary by these Tontine Plans, might perhaps become known to the public if the advertisement of them were not too profitable to admit of free discussion in the daily press.

BOSTON, July 11, 1872.

LIFE INSURANCE BY THE GOVERNMENT.

The London *Insurance Guardian* does not believe in the government engaging in the business of life insurance, and quotes Jules Simon in his celebrated work on liberty, concerning the injurious influence of the half-million public functionaries in France on the national character. It says: "The French philosopher winds up thus: 'Public spirit, so necessary to liberty, cannot exist in a country in which out of every dozen citizens there is a civil servant, a son of a civil servant, and three or four candidates for the civil service.—There is a decided incompatibility between the two ideas—a nation of public functionaries and a free nation.'"

"The Gladstone government would do well to consider the dictum of the philosopher ere they embark on the troubled sea of life assurance on a large scale. The State provides churches for us—baptizes, marries, divorces, and buries us. It has dabbled in banking; the small parcel trade it got or is getting through the post-office, and it wants the whole railway system of the country under its control, as well as the life assurance and annuity business.—We expect to live to see it wash, and make, and mend our clothing and our linen—build, repair, whitewash, and otherwise cleanse and alter all our dwellings,

and, having left us nothing to do but to think, official organs will appear pointing out the proper view to take of current questions."

This has always appeared to us one of the principal objections to the undertaking any such work by our own government. Certain departments of public service, such as the coinage of money, and the maintenance of the navy, are of a character that private enterprise cannot satisfactorily undertake, and it is eminently proper that they should devolve on the government. The same may be said of protecting the people against banking and insurance frauds, by official supervisors. But the attempt to supplant private enterprise, in any business where such interference is not required, is antagonistic to the spirit of a free government. Even in England the principle of constitutional liberty is so strong that all such movements have been regarded with distrust.—*Ins. Monitor*.

JUSTICE GRIER.

The whole bar of the United States knew of and honored the commanding intellectual powers and the great attainments of the late Justice Grier, of whose judicial capacities we now have the additional evidence in the beautifully printed third volume of his decisions. His fearlessness in the discharge of duty, and his ready caustic wit, were as remarkable as either his learning or his abilities. An illustration of both the former occurred not long before his death, in a suit that he was trying in Pittsburg. Some man had bro't an action against the Pennsylvania Railroad Company, to recover damages for personal injuries. The company brought several witnesses of entirely good character, to prove that the plaintiff had been drinking to excess, and that the accident by which the injury was caused, was attributable to that fact more than to sudden stoppage of the train, which was the cause that the plaintiff alleged for it. Judge Grier told the jury that if they believed the defendant's witnesses, they would have to find, as of necessity, in favor of the defendant. The jury then went out, and in a few minutes brought in a verdict

of \$5,000 for the plaintiff. Judge Grier looked perfectly composed, and, turning to the clerk said, in a strong sharp voice: "Clerk, enter that the jury find for the plaintiff, and assess the damages at \$5,000, and that the court sets the verdict aside. I will have this jury know that in the Circuit Court of the United States for the third circuit, it takes thirteen scoundrels to cheat even a railroad company of its lawful rights." Then turning to the jury: "Gentlemen of the jury, you are discharged for the rest of the term."—Then addressing the marshal: "Never let me see the faces of these fellows in this court again. Do you hear what I say? Never summon one of them again."—*Legal Opinion*.

LIFE INSURANCE AND BUSINESS.

The following is taken from an article in the *Baltimore Underwriter*:

"That the beneficent character of life insurance is appreciated by the people of this company is attested by the eight hundred thousand policies now in force for the benefit of wives and children and dependent relatives; but its relations to business, its aid to credit, and its capacity to promote trade have never been recognized, or hardly considered. The claims of the dependent have been urged as the sole motive for life insurance, until it has come to be regarded as simply an eleemosynary institution, and not a business matter.—And yet, in the uncertainties of business, one would suppose that the prudent business man would look to life insurance as a help to credit as well as a sustenance for the dependent family.

When life insurance shall be recognized as a legitimate business, and its ability and facility to advance the individual's particular calling, then it will, like fire insurance, be sought after, and the companies be relieved of that enormous cost, now required to procure business.

How is this to be brought about? The present life rate, as adopted by either stock or mutual companies, does not discriminate sufficiently in the interest of trade, nor permit short policies on lives, as is the case in fire business: hence, when life insurance is presented to the business

man, either as a security for his creditors or as an aid to his credit, he regards the transaction as one maturing after death, as "a game at which he must die to win," and not as a matter of business prudence. Business men know nothing of life insurance as a protection to capital, or as a means of increasing and establishing credit; and unfortunately the ordinary solicitor knows too little of business or trade to explain how life insurance may be made to work to their advantage. When the intelligent solicitor shall be able to present to the business men of the country the manifest advantages which life insurance may secure to business as well as to the family, and exhibit tables of rates of insurance for risks limited to a short term of years, a union of life insurance with trade and business may be consummated which will promote the former far beyond its present gigantic proportions.

When business men are made to comprehend that a life policy for the benefit of creditors is evidence of honesty and business forecast which will not fail of its reward; when partners are made to understand that by a life policy the troubles which so often befall co-partnership by the death of one of the partners may be entirely avoided, life insurance will be recognized as a valued handmaid to trade and business.

The various ramifications of the relations between life insurance and the business interests of the country, are too numerous to be even alluded to in any article like this, but they must suggest themselves to every business man who reflects intelligently upon the proposed union. There is no branch of business or trade that may not be benefited and promoted by connecting them with a life policy, and companies and solicitors will promote their business greatly by studying this relation.

GOVERNMENT INSURANCE IN GERMANY.

In some of the small German States and in Switzerland, the buildings are compulsorily insured by the government. Every building when it is erected is appraised by government inspectors, and its value entered on the books in the Fire Insurance

Department branch. Whenever a building burns, the damages are assessed by an official and the owner reimbursed for his loss, based on the valuation previously made; this reimbursement must be applied to rebuilding. At the end of the year the losses paid are assessed on the buildings in the shape of an insurance tax, just as any other special tax. A rigid inspection is maintained and periodical visits made by the fire-wardens to see that proper precautions against fire are preserved. According to the Annual Statement of the Canton, of Zurich, for 1870, the value of the buildings insured was about \$80,000,000, on which the losses and expenses were about .12 per cent.—*Insurance Monitor*.

VITALITY OF LIES—THE BLUE LAWS.

The vitality of lies is something astounding. There is the current fiction known as the "Connecticut Blue Laws." These so-called laws are purely fictitious. They were written and published as a satire on the people of Connecticut, and were absolutely without any other foundation than the brain of the practical joker who drew them up. The fact that they never were enacted, and never were meant to be, has been proved scores of times, and yet a week seldom passes without some allusion to them by men who either believe, or affect to believe, them genuine. No longer ago than Sunday last, a Catholic clergyman of this city preached a sermon in which he quoted from these Blue Laws to prove the intolerance of the early settlers of Connecticut. Doubtless he believes them to be a part of the Connecticut statute book. He might better have quoted *Knickerbocker's New York* as a varacious history, since the latter does contain a little truth, while the "Blue Laws" are fictitious from beginning to end.—*N. Y. Times*.

ITEMS.

It has been noticed that juries are affected by evidence addressed directly to the senses—so much so, at times, that they forget whether this evidence had any

bearing in that case. Such a case as this is that in which Shakespeare proves Jack Cade's identity by making a man testify: "Sir, he made a chimney in my father's house, and the bricks are alive this day to testify it; therefore deny it not." Another case is that quoted in "The Amber Witch," in which a poor girl charged with witchcraft complained that she was the victim of the sheriff, and in proof pointed to his nose, which she had scratched in the struggle with him while he was trying to outrage her. The sheriff replied that it was his lap-dog that had scratched him, and having produced the dog, the court was satisfied with the truth of the explanation.

WHEN Mr. John Clerk, (afterwards Lord Eldin,) was at the bar, he was remarkable for the *sang froid* with which he treated the judges. On one occasion, a junior counsel, hearing their lordships give judgment against his client, exclaimed that he was "surprised at such a decision." This was construed into a contempt of court, and he was ordered to attend at the bar next morning. Fearful of the consequences, he consulted his friend, John Clerk, who promised to apologize for him in a way that would arrest any unpleasant result. When the name of the delinquent was called, Mr. Clerk, therefore, arose and addressed the solemn tribunal: "I am very sorry, my lords, that my young friend has so far forgotten himself as to treat your honorable bench with disrespect: he is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance. You must see at once that it did originate in that. He said he was 'surprised' at the decision of your lordships. Now, if he had not been very ignorant of what takes place in this court every day—had he known your lordships but half so long as I have done, he would not be surprised at anything you do."

A MYSTERIOUS fire occurred in a bonded warehouse in New York, which Fire Marshal McSpedon decided was the result of spontaneous combustion. He found that the fire originated in a case of silk

twist packed in a tight case, with two layers of thick paper and one layer of oil-cloth between the case and the goods, thus entirely excluding the air. The goods had evidently been packed while in a damp condition, and the intense heat of the weather favored the chances of spontaneous ignition. The fire having been extinguished, this theory was afterwards vindicated by the breaking out of a new fire in the same case. The marshal says that goods packed in a similar manner, whether the fabrics be of woolen, cotton, hemp or silk, will ignite at any time when the atmosphere favors.

W. H. FINCH has been appointed Examiner of Corporations, by the Secretary of State of North Carolina. This appointment virtually makes Mr. Finch, Superintendent of Insurance for that State, with power to investigate the affairs of every insurance company doing business in the State.

THE Life Association has reinsured The Policy-holders and Tontine Assurance Society of Charleston, S. C., and the Empire Life Insurance Company of Watertown New York.

GOV. BROWN has appointed Miles Sells Superintendent of the Insurance Department of Missouri, for the unexpired term of Hon. Wyllis King, deceased.

By the revised tariff law passed at the last session of Congress, no revenue stamps are to be required, after the first of October next, upon any papers except the two cent stamps on checks, sight drafts, and money orders. This relieves all policies, renewals, and other insurance contracts from the revenue stamps heretofore required.

CHARLES A. WAILES has been appointed Insurance Commissioner of Maryland.

THE Hope Mutual Life Insurance Company has re-insured the business of the Craftsmen, and the latter company goes out of business.

CURRENT TOPICS.

—A dividend of 10 per cent. has been declared on the adjusted policy claims in the Albert Life Company.

—A curious suit was recently tried at Ellsworth, Maine. It was upon a promissory note. The defense was that the note was one that was written for practice, as the defendant and his brothers were one evening studying "partial payments." One of the notes was made payable to an old man, who happened to be in the room. Nothing was heard of it for several years. The old man died, and the note was presented for payment by one, who claimed he purchased it for a valuable consideration. The defendant, luckily for him, was able to prove his non-age at the date of the note, and thus got clear.

—The Supreme Court of Chicago has decided that the stockholders of the Republic Fire Ins. Co. are liable for their unpaid stock.

—The *Spectator*, speaking of the twenty life insurance companies that have retired from business during the past two years, says: "The best computation we can now make clearly shows that during their latter life, these companies, struck with death though they were, issued policies at the rate of 23,000 a year, insuring at least \$55,000,000 in risks. Will any one deny that the inventing of such a business as this was not an auspicious fact?"

—Constantinople has been visited by another fire, which destroyed more than 1,000 houses.

—The new insurance law of Virginia taxes companies from other States a license of \$300 per annum, and a tax of one and one-half per cent. on the gross premium receipts in excess of \$300.

—A ship loaded with coolies was lost, and the owners brought suit in an English court for their passage money. The court held that the term freight in the policy did not cover the loss.

—Erastus Lyman has resigned his office as president of the Knickerbocker Life Insurance Company.

—Edwin W. Bryant, Esq., has accepted the appointment of actuary of the Life Association.

—At a recent meeting of the Dunkers or German Baptists, as they are sometimes call, at Smithville, Ohio, the body discussed the question, "What shall be done with a brother who gets his life insured and insists that there is no wrong in it, and refuses to withdraw his policy?" The committee to whom the question was referred, answered: "Bear with him until the annual meeting decides."

—Down in Arkansas a man was lately sentenced to be hanged, but all the carpenters in the neighborhood refused to build the scaffold. As the condemned man was himself a carpenter by trade, the sheriff tried to induce him to put up the gallows, but he steadfastly declared he'd be hanged if he did.

—The School of Law in Boston University has been organized, and the lectures will begin next October.

—In all policies of life insurance these, among a host of other questions, occur: "Age of father, if living?" "Age of mother, if living?" A man in the country who filled up an application made his father's age, if living, 120 years, and his mother's 102. The agent was amazed at this showing, and fancied he had got an excellent subject; but, feeling somewhat dubious, remarked that the man came of a very long-living family. "Oh! you see, sir," replied the applicant, "my parents died many years ago; but 'if living' would be aged as there put down." "Oh! I see," said the agent.

—The *Northwestern Review*, in speaking of the Andes, makes the following remarks in regard to Mr. Bennett:

"Mr. Bennett's fall from his high position—a fall which we think can be only temporary—elicits much sympathy at the hands of his fellow-underwriters, especially in the West. No man in the country occupied a position in insurance circles which seemed to combine in itself the elements of grandeur and peril so fully as did Mr. Bennett. To no other underwriter did the achievement of success seem

to present itself so forcibly, as the one condition of the maintenance of his good name, as to him. Unfortunately, his hopes have been frustrated and his calculations rendered futile. But the record of the "Andes," under his direction, even though it never recovers from its present disaster, can never rightly be regarded as being inglorious. No other company in the world's history was ever called upon to pay in losses in a single fire a million of dollars before it was two years old. The tremendous demand upon its resources caused by the great conflagration in this city, met with a ready and full response, and the "Andes" justly received the plaudits and admiration of thinking men all over the country. To that calamity, however, may be attributed principally, we think, the condition of the "Andes" to-day. The serious losses which it has since sustained have at last proved too much for it to bear, and its magnificent inception, marvelous growth, praiseworthy fortitude, and sad decline, are now all before the country. We do not wish to say aught harsh about it, or its remarkable originator, Mr. Bennet.—Of the latter we may safely say that he will come up again as certain as he lives.

—The ex-Emperor Napoleon has been sued for breach of contract by the publishers of his work on Julius Caesar. The case will be tried before the first chamber of the civil tribunal at the next term.

—The cause of life insurance has lost a valued and trusted officer in the death of George W. Sargent, deputy commissioner of Massachusetts. He had been for some months in failing health. He is succeeded by Stephen H. Rhodes, of Taunton.

—An exchange gives the substance of the verdict of a recent coroner's jury on a man who died in a state of inebriation:—"Death by hanging—round a rum-shop."

—By an act passed at the late session of Congress, all invalid pensioners who receive fifteen, twenty and twenty-five dollars per month, under the act of June 6, 1866, are now entitled to eighteen, twenty-four and thirty-one and a quarter dollars re-

spectively, from the 4th of June, 1872. They may obtain this increase without formal application, or the intervention of an attorney. A letter, inclosing the pension certificate, and addressed to the Hon. Commissioner of Pensions, Washington, D. C., will be sufficient presentation of the claim for increase.

—Quite recently, a coroner's jury in Connecticut, were deliberating over the body of a man whose predilection for strong drink had brought him to a quiescent state, and they had just concluded to bring in a verdict of "delirium tremens," when the supposed defunct rose to a semi-recumbent posture and exclaimed, "Here is one of your jury as votes 'No'."

—The *Philadelphia Underwriter*, in speaking of the American Insurance Company, says:

"The management of the American is in the keeping of officials than whom none are more competent. It is presided over by H. Z. Culver, as President, with a directorate of highly esteemed business men; but to the extraordinary ability, energy, foresight, quick discernment and decision of its Secretary, Chas. L. Currier, Esq., is due the success which has so far attended the company. We unhesitatingly record the American Insurance Company of Chicago as an institution in its peculiar sphere having no equal—a company entitled to the respect and fullest confidence of the insuring community."

—The happy stockholders of the Manhattan Life have been in luck for the past few years:

Cash dividends, 1869,	\$58,000
" interest, 1869,	7,000
" dividends, 1870,	48,000
" interest, 1870,	7,000
" dividends, 1871,	43,000
" interest, 1871,	7,000

\$170,000

Only 57 per cent. The stock is \$100,000.

The most profitable underwriting we have lately seen is that of the Manhattan Life.—*West. Ins. Review.*

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME
AND CIRCUIT COURTS, AND IN THE STATE SUPREME
COURTS, SINCE JANUARY 1, 1871.

From certified transcripts in our possession.

AGENT.

§ 210. FIRE.—*Knowledge of—Estoppel.*—The policy provided that if the insured failed to state his true title to the property, or if the same was not expressed in the policy in writing, or if there was or should be any prior or subsequent insurance on the property, without the consent of the company, then the policy should be void and of no effect. The policy also contained the following provision: "It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The appellees applied to Holmes,

an agent of another company, who was familiar with the property, and had procured all the policies upon it except one, to get more insurance. He wrote to one Folson, a local agent for appellant, who wrote back to Holmes to make out an application, and that he would forward it to the company. Holmes, without further communication with the appellees, wrote the application and signed the names of the appellees to it, making comments under the head of "remarks of agent," and signing his own name as "Solicitor." This application he sent to Folson, who forwarded it to the company. The company thereupon sent the policy to Folson, who forwarded it to Holmes, and he delivered it to the appellees, who paid the premium, which he forwarded to Folson. Holmes had previously obtained a policy in the same manner through Folson from the appellant. The application stated the title as "fee," and that there was then other insurance on the property in two companies. The title of the property was a bond for a deed, and the appellees then had policies in two other companies besides those mentioned. *Held*, that the company "issued this policy, relying entirely upon its knowledge of the facts, and dispensing with any information from the assured. In such a case it is precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same."

Atlantic Ins. Co. vs. Wright, 22 Ill., 462 ; New England F. and M. Ins. Co. vs. Schuttler, 38 Ill., 168.

Held, also, that "the issuing of this policy as and for a valid policy, and taking the premium for it as such, was a representation that the policy was then valid, and the company is estopped to say or show the contrary. It is an estoppel *in pais*. When a party either by his declaration or conduct has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person. This is a clear rule of law."

Watson, Ex'r, vs. McSaren, 19 Wend., 537.

Held, also, that "a device of mere words cannot, in a case like this, be imposed upon the view of a court of justice in the place of an actuality of fact, and make this company and its agents the

agents of the appellees, and their doings the doings of the appellees."

*Commercial Ins. Co. vs. Ives.**

Rep'd Jour'l p. 822.

ILL. S. C.

CONCEALMENT.

§ 211. ACCIDENT.—*Insanity.*—The deceased, upon making application for the policy, stated that there were no circumstances which rendered him peculiarly liable to accident, and did not mention the fact that he had been insane several years before. *Held*, that "if the deceased did not conceal any fact which in his own mind was material in making the application, the policy was not void."

Rawls vs. The American Mut. Life Ins. Co., 27 N. Y., 282; *Van Lindeman vs. Desborough*, 14 Eng. C. L., 343; *Valton vs. National Fund Life Assur. Co.*, 20 N. Y., 32.

Mallory vs. Travelers' Ins. Co.†

Rep'd Jour'l, p. 840.

N. Y. C. A.

CONSTRUCTION.

§ 212. LIFE.—"*In known violation of any Law*"—*Avoidance of Policy*—*Death in known violation of Law.*—The policy upon the life of the assured contained a proviso that the policy should be null and void in case the assured should die "by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in known violation of any law of these States or of the United States." After the policy had been issued, the assured demanded of a boy seventeen or eighteen years old, between whose father and himself there had been some difficulty, the payment of a bill which he claimed the father owed him, and upon the boy's refusing payment, he attempted to take possession of a pair of horses the boy was driving, and while so engaged was shot by the boy and killed. *Held*, that whether the proviso applies only to a violation of criminal law, or embraces all illegal acts of such a character as to lead to violence, it is clear that to

* Decision rendered January 25th, 1871.

† Decision rendered December 12th, 1871.

make good the defense, a relation must exist between the violation of the law and the death, and that it cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that at the time of the death the assured was violating the law, if the death occurred from some other cause than such violation. If the boy killed the assured not in the course of the affray, but merely to revenge himself for what had been done, the case was not within the proviso.

Cluff vs. Mut. Benefit Life Ins. Co., 13 Allen, 318; *Bank of Ireland vs. Trustees of Evans Charities*, 5 House of Lord's Cases, 410; *Commonwealth vs. Drew*, 4 Mass., 396.

*Bradley, Ex'r, vs. The Mutual Benefit Life Ins. Co.**

Rep'd Jour'l, p. 48.

N. Y. C. A.

EVIDENCE.

§ 213. FIRE.—*Oral Evidence and Written Contract—Reading Policy.*—The policy sued on expressly declared that only goods not hazardous and hazardous were insured, and that the keeping of extra hazardous and specially hazardous goods on the premises should avoid the policy. The appellant offered to prove that before the issue of this policy a policy issued by another company to the plaintiff's assignor on his stock, "such as is usually kept in country stores," contained in the store in question, was mailed to the respondents with the request to issue their policy on the stock in the same store, in the language of, and just like the policy sent, and that the wording should be followed exactly as in that policy, and that in response to that request the defendants sent the policy in suit. *Held*, that the evidence was properly rejected, "First, because the facts offered to be proved would not, if established, have justified or sustained an inference or finding by the jury that the policy sent was intended as a compliance with the request made by the plaintiff's assignor," and second, had the offer been to prove by oral evidence that the parties to the contract intended the policy in suit to be co-extensive with the policy sent, such evidence would have been wholly inadmissible. *Held*, also, that the fact that neither the assured nor the plaintiff discovered the difference between the wording of this

* Decision rendered April 25th, 1871. § 13 is erroneous, as the opinion by *Rapallo, J.*, is the opinion of the court, and the opinion of *Grover, J.*, is the dissenting opinion.

policy and that of the policy sent, the company, until after the fire, could not change the construction of the instrument, and that the failure of the assured to read the policy could not enlarge the liability which it imposed upon the respondents.

*Pindar vs. The Resolute Fire Ins. Co.**

Rep'd Jour'l, p. 827.

N. Y. C. A.

§ 214. FIRE.—*Rule of, in Charge of Burning Property—Confession—Jury.*—The interrogatory required the jury to find “whether the plaintiffs, or either of them, caused, procured, planned, or instigated the burning, or whether either of them set fire to the building, consented to or connived at the burning.” *Held*, in the instructions to the jury, that the charge of willful burning is made by the defendants, and must be proved by them; that as between the rule in criminal and the rule in civil cases, the rule in civil cases applies, and that “in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence taken altogether, must be such as clearly satisfies you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused, or procured the act in question to be done. On this point the decided cases are conflicting; but the foregoing seems to the court to express the sound and true rule of law on the subject.” *Held*, also, that any confessions extorted from either of the plaintiffs are to be entirely disregarded. It is a free and voluntary confession, only, that should be considered. Confessions made from hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence, and should be weighed by you. You are the exclusive judges of the weight of evidence.

Scott et al. vs. Home Ins. Co.†

Rep'd Jour'l, p. 750.

U. S. C. C. DIST. MO.

LIMITATION.

§ 215. FIRE.—*Clause in Policy—Waiver.*—By a proviso in the policy it was to be void unless suit was brought within twelve

* Decision rendered December 19th, 1871.

† Decision rendered April, 1871.

months after the loss occurred. The fire occurred October 17th, 1869. On the 6th of November of the same year the insured agreed to accept, and the company agreed to pay, on the 6th of February, 1870, the amount that had been determined by an adjustment, unless the company should, before that time, notify him of its intention to contest its liability, under the policy, for the loss. The company gave no notice of such intention, and suit was brought November 7th, 1870. *Held*, that the period from November 6th, 1869, to February 6th, 1870, should be excluded in the computation, and that action was brought within the limitation specified in the policy.

Killips vs. Putnam Fire Ins. Co., 1 Ins. Law Jour'l, 169.

*Black et al. vs. The Winnesheik Ins. Co.**

Rep'd Jour'l, p. 811

WM. S. O.

LOSS

§ 216. MARINE.—*Measure of—Sale at Auction—Expense of.*—The company issued a policy for \$15,000, upon a lot of corn, valued at the sum insured, on board a bark, from Chicago to Montreal. The grain was damaged on the voyage. A portion of the corn was sold at auction. The basis of the verdict in the court below was the difference between the market price of the sound and the market price of the damaged corn. *Held*, that this was not a correct measure of the company's liability, and that when the corn arrived at the port of destination sea damaged, the first point to be ascertained was the extent of the depreciation in value which it had suffered. This could be ascertained by simply comparing the price for which the corn would have sold in market had it arrived there sound with the price for which it might have sold arriving there damaged. The object of the comparison is to ascertain, not the direct, but the relative amount of the owner's loss. When this is ascertained, the liability of the insurance company is ascertained also, for it is to pay the same proportional part.

Lewis vs. Rucker, 2 Burr., 1167; Usher vs. Noble, 12 East., 647; Johnson vs. Sheddon, 2 East., 581; 2 Arnold on Ins., 969.

Held, also, that sales by auction are resorted to mainly with the

* Decision rendered April 24th, 1872.

view of comparing the sound and damaged values. There may be other modes. The question in all such cases is, was that expense reasonable and proper for the purpose of ascertaining the amount of the loss? If it be, then it is a part of the loss.

Muir vs. United Ins. Co., 1 Caines' R., 49; 2 Parsons' Marine Ins., 399; 2 Arnold, 973.

Held, also, that in this case, the items for surveys, inspection and sale at auction may be properly chargeable as a part of the loss.

Lamar Fire Ins. Co. vs. McGlashen,*

Rep'd Jour'l, p. 831.

ILL. S. C.

POLICY.

§ 217. FIRE.—*Avoidance of—Change of Title—Rights of Assignee.*—The policy contained a condition that in case of any sale, transfer or change of title in the property insured, the insurance should be void. At the time the insurance was effected, the insured was absolute owner of the property. After the delivery of the policy, he assigned it, with the consent of the company, to Seibert, the mortgagee, and subsequently to this he sold and conveyed it to three other persons, one of whom reconveyed to him, and the other two executed mortgages to him to secure the purchase money. *Held*, that there was a change in the title of the property, and by the act of the insured the policy became void.

Dix vs. Mercantile Ins. Co., 22 Ill., 272; *Hartford Fire Ins. Co. vs. Ross*, 23 Ind., 179; *Finley et al. vs. Lycoming Co. Mut. Ins. Co.*, 30 Penn., 311; *Tittmore vs. Vermont Mut. Fire Ins. Co.*, 20 Vt., 546.

Held, also, that "the assignee of a policy takes it subject to the conditions expressed upon its face, and his equities confer no right if the assignor has lost all right of recovery by a violation of any of the terms or conditions of the policy."

Ill. Mut. Fire Ins. Co. vs. Fix, 53 Ill., 151.

Home Mut. Fire Ins. Co. vs. Hauslein,†

Rep'd Jour'l, p. 818.

ILL. S. C.

§ 218. FIRE.—*Construction of—Title.*—The insured, in reply

* Decision rendered January 25th, 1871.

† Decision rendered April 11th, 1872.

to a question in the application as to what the title to the property was, and whether it was incumbered by mortgage or otherwise, and to what amount, answered, "Fee simple." At that time he had a fee simple title, subject to an incumbrance. The person holding the incumbrance informed the officers of the fact before the policy was issued, and the incumbrance was mentioned in the policy. *Held*, that considering the policy and the application together, the answer to the question was, fee simple, subject to the lien of Reynolds. There was no concealment of the true character of the title, and consequently no fraud practiced.

*Home Mut. Fire Ins. Co. vs. Garfield.**

Rep'd Jour'l, p. 844.

ILL. S. C.

§ 219. ACCIDENT.—*Assignment of—Payee of.*—The deceased procured the policy upon his own life, and paid the premium therefor. The amount of the insurance was made payable to his daughter, who was the plaintiff in the suit, or to her legal representatives. *Held*, that "this in effect was a policy procured by him upon his own life, and an assignment thereof to the plaintiff."

Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391; Rawls vs. American Mut. Ins. Co., 27 N. Y., 282.

Mallory vs. Travelers' Ins. Co.

—4 211.

REBUILDING.

§ 220. FIRE.—*Notice of—Restrictions in Charter.*—By the terms of the policy the company agreed to pay the sum insured within three months after the loss and notice thereof, unless the directors should, within said three months, determine to rebuild or replace the property destroyed. The charter of the company provided that the directors should not expend in building or repairs more than the sum insured on the premises. The company after the loss gave notice to the insured that it elected to rebuild. *Held*, that the company merely reserved the right to replace the property to avoid the payment of the money, and that the notice effected no change in the character of the contract, and that upon the lapse of a reasonable time after due notice to rebuild

* Decision rendered January 25th, 1871.

without prompt measures being taken for such purposes, the company is liable for the amount of the policy and interest. *Held*, also, that the provision in the charter was a restriction upon the company, and a part of the contract between the parties.

Home Mut. Fire Ins. Co. vs. Garfield.

—§ 218.

SUBROGATION.

§ 221. LIFE.—*Liability of Principal and Surety—Notice to Surety.*—Wallis, a local agent of the company, as principal, executed a bond to the company, with appellant Hough as surety, conditioned that he should pay over to the company all moneys he might receive. Raymond was general agent of the same company, and bound by his contract to pay over all moneys received by himself and local agents. Wallis failed to pay over certain amounts collected for the company, and Raymond, in the general management of the affairs of the company, paid the money, taking from Willis his promissory notes, to be paid in a few days. These notes were not surrendered before the judgment. *Held*, that “the principle of subrogation applies to the facts of this case. The rule is, that where the person who pays the debt stands in the situation of a surety, or is compelled to pay for the protection of his own interests, then in either case the substitution will be made.” *Held*, also, that “so far as the rights and remedies of the insurance company are concerned, appellant and Wallis are both principals; Hough was primarily liable for any defalcations, and the company was not compelled to sue Wallis before resorting to its remedy against the surety,” and that no notice to the surety was necessary before the suit.

Orme vs. Young, 3 E. C. L., 35; Taylor vs. Bank of Kentucky, 2 J. J. Marshal, 564; Pittsburg, Fort Wayne and Chicago R’y Co. vs. Shaeffer, Penn. St. R., 300.

Held, also, that it was error to render judgment on the bond without a surrender of the notes. If the notes were received in actual payment of the defalcation, then the liability upon the bond is discharged.

*Hough vs. Aetna Life Ins. Co.**

Rep’d Jour’l, p. 836.

ILL. S. C.

* Decision rendered September 28th, 1871.

§ 222. ACCIDENT.—*Insurer and Injurer*.—The plaintiff received an injury from an accident caused by the unsafe condition of the highway. The statute made the town liable for damages happening to any person by reason of the insufficiency or want of repair of any highway in the town. After the plaintiff had received from an insurance company the amount of an insurance for the injury caused by the accident, he brought suit against the town for the damages he had sustained by the same accident. *Held*, that “there is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter.” If it is assumed that the plaintiff is entitled to but one satisfaction for the injury he has sustained, the defendant stands in no condition to make that objection. As between the insurer and the defendant, the defendant ought primarily to make compensation to the plaintiff, and ultimately to bear the loss and the payment by the insurer, and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them.

Mason vs. Sainsbury, 3 Doug., 61 ; Clark vs. Inhabitants of the Hundred of Blithing, 2 B. & C., 254, (9 E. Com. L., 77 ;) Yates vs. Whyte et al., 33 E. Com. L. R., 349, (4 Bing., New Cases, 272 ;) Propeller Monticello vs. Gilbert Mollison, 17 How., 152 ; Althorp, adm’r, vs. Wolfe, 22 Smith, 355.

Harding vs. The Town of Townsend.*

Rep’d Jour’l, p. 685.

VT. & C.

SUICIDE.

§ 223. ACCIDENT.—*Construction—Accidental Death*.—The insured was last seen alive walking toward a railroad bridge, which was used to a considerable extent by pedestrians for crossing the

* Decision rendered February Term, 1871

stream. The body was found a few days afterward in a pond near the bridge. There was a wound upon the head and a break in the corresponding part of the hat. The policy only applied to cases where the death was caused by an injury received from an accident. *Held*, that from the facts it appeared that the death was either caused by an injury received from an accident, or by the suicidal act of the deceased, and that the presumption is against the latter. *Held*, also, that if a wound produced by an accident did not cause his death, but did cause him to fall into the water, where he died from drowning, then his death was accidental, and it was for the jury to say how the wound was caused, and to determine its effect upon the question whether the death was the result of an accidental injury or whether the deceased had destroyed his own life.

Mullory vs. Travelers' Ins. Co.

—§ 311.

UNLAWFUL CONTRACT.

§ 224. **HEALTH.**—*State Legislation—Foreign Corporation—Citizenship of Corporation.*—The appellee was a citizen and resident of Illinois, and the appellant an insurance company incorporated under the laws of Ohio. An act of the Illinois legislature provided that it should not be lawful for any agent of any insurance company, incorporated by any other State, to directly or indirectly take risks or transact any business of insurance in that State without first furnishing the State Auditor a statement of the affairs of the company, and procuring from him a certificate of authority to do business. The appellee gave the note sued on for stock in the company, and for the premium on a health policy. At the time the policy was issued and the note given the company had not complied with the provisions of the act. *Held*, that corporations created in another State are not citizens of such State within the meaning of the federal constitution, and that State legislatures have the power to impose conditions upon which insurance or other corporations chartered beyond the State may do business in its territory, and that the right of protecting their citizens against the fraud and imposition of insolvent or spurious corporations, created by other States, was clearly within

the scope of legislative power possessed by the various States of the Union.

Ducat vs. City of Chicago, 48 Ill., 173 ; Paul vs. State of Virginia, 8 Wal., 168.

Held, also, that if the charter of the Ohio company declared that it might do business in other States, it could only operate as an authority to the company to do so on such terms as other States might prescribe. *Held*, also, that the contract is absolutely void as to the appellee,

(Munsell vs. Temple, 3 Gilm., 9.)

And that the fact that the legislature imposed by a subsequent section of the act a penalty for the violation of the provisions of the law, does not in the remotest degree legalize or give validity to the note.

Bensley vs. Bignold, 5 Barn. & Ald., 335 ; Law vs. Hodgson, 2 Camp., 147, (11 East., 300 ;) Langton vs. Hughes, 2 Maule & Selw., 593 ; Briggs vs. Lawrence, 3 T. R., 454 ; Clugus vs. Pinkham, 4 T. R., 466 ; Waymell vs. Ried, 5 T. R., 599 ; Wheeler vs. Russell, 17 Mass., 258.

*Cin. Mut. Health Assur. Co. vs. Rosenthal.**

Rep'd Jour'l, p. 813.

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* Decision rendered January 25th, 1871.

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